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COMMENTS

AMERICA THE CRUEL AND UNUSUAL? AN ANALYSIS OF THE EIGHTH AMENDMENT UNDER INTERNATIONAL LAW

In 1992, the United States ratified the International Covenant on Civil and Political Rights [ICCPR].¹ ICCPR, along with its sibling document, the International Covenant on Economic, Social and Cultural Rights [ICESCR],² and their parent document, the Universal Declaration of Human Rights [Universal Declaration],³ constitute the United Nations'

1. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, reprinted in 6 I.L.M. 368 (1967), adopted by the United States Sept. 8, 1992 [hereinafter ICCPR]. In addition, the United Nations also established the Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force Mar. 23, 1976, reprinted in 6 I.L.M. 368 (1967) [hereinafter Optional Protocol] (establishing procedures for the implementation of ICCPR through state reporting and the submission of communications by individuals whose rights a State party allegedly has violated under ICCPR). For a comprehensive treatment of the United States ratification of ICCPR, see *Symposium: The Ratification of the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1167 (1993); John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59 (1993).

2. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976 [hereinafter ICESCR]. The United States has not ratified either the ICESCR or the Optional Protocol. See HUMAN RIGHTS - INTERNATIONAL INSTRUMENTS: CHART OF RATIFICATIONS AS AT 31 DECEMBER 1994, at 10-11, U.N. Doc. ST/HR/4/Rev.11, U.N. Sales No. E.87.XIV.2 (1995) (listing the countries that have ratified the major international human rights conventions); see also Oscar M. Garibaldi, *Obligations Arising Under The Covenant and Protocol*, in U.S. RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS 51-61 (Hurst Hannum et al. eds., 1993) (explaining the relationship between ICCPR and the Optional Protocol); LIESBETH LIJNZAAD, RESERVATIONS TO UN-HUMAN RIGHTS TREATIES: RATIFY AND RUIN? 185-297 (1995) (discussing reservations made to ICCPR, on a country-by-country basis).

3. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration]. The Universal Declaration articulated "rights as to which governments agreed to promote observance." FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 2 (1991). After the United Nations General Assembly adopted the Univer-

International Bill of Human Rights.⁴ The two Covenants provide a more specific interpretation of the Universal Declaration.⁵ Unlike the more general and aspirational articles of the Universal Declaration, ICCPR and ICESCR are binding treaties that provide procedures for the implementation of the rights and obligations promulgated in the Universal Declaration.⁶

In submitting his proposal for ratification of ICCPR to the Senate for its Advice and Consent,⁷ President Bush argued that ratification of ICCPR reflected the role that he envisioned for the United States as a

sal Declaration, the United Nations Commission on Human Rights drafted the two Covenants. *Id.* at 2-3.

For a more detailed treatment of the Universal Declaration, see *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY* (Asbjorn Eide et al. eds., 1992).

4. See NEWMAN & WEISSBRODT, *supra* note 3, at 2-3 (discussing the structure of the International Bill of Human Rights and the role of each of the two Covenants therein). The articles of ICCPR were intended to address the most fundamental human rights, such as the right to be free from torture, slavery, and genocide. ICCPR was intended to be immediately applicable. ICCPR, *supra* note 1, art. 2(1) (describing the commitment of States parties as "undertak[ing] to respect and to ensure" that the rights contained in the Covenant are respected). By contrast, States parties to the ICESCR commit to implement the economic, social, and cultural rights embodied in ICESCR "to the maximum of . . . available resources, with a view to achieving progressively the full realization of the rights . . . by all appropriate means, including particularly the adoption of legislative measures." ICESCR, *supra* note 2, art. 2(1) (describing the commitment of States parties as "undertak[ing] to take steps"). Newman and Weissbrodt contrast the nature of the obligations of ICCPR and ICESCR thus "governments that ratify the Covenants should immediately cease to torture their citizens, but are not immediately required to feed, clothe, and house them." NEWMAN & WEISSBRODT, *supra* note 3, at 3.

5. The preamble of the Universal Declaration describes the commitment of States parties as "pledging." Universal Declaration, *supra* note 3, Preamble (stating that "(w)hereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms"). The preambles of the two Covenants, however, describe the commitment of States parties as "agreeing." See ICESCR, *supra* note 2, Preamble; ICCPR, *supra* note 1, Preamble. Newman and Weissbrodt describe the purpose of the two Covenants as "[to] interpret provisions of the Universal Declaration in binding treaties and supply implementation procedures for states parties." NEWMAN & WEISSBRODT, *supra* note 3, at 2-3. Furthermore, the Optional Protocol provides procedures for implementing the provisions of ICCPR. Optional Protocol, *supra* note 1, art. 1 (providing mechanisms for state reporting and the submission of communications from individuals whose rights have allegedly been violated by a State party); see also NEWMAN & WEISSBRODT, *supra* note 3, at 3.

6. See *supra* note 5 and accompanying text (describing the structure of the International Bill of Human Rights and the role of the two Covenants in implementing the Universal Declaration).

7. See U.S. CONST. art. II, § 2, cl. 2. Ratification of ICCPR, like any treaty, required the President to seek the advice and consent of the Senate. *Id.* The Treaty Clause states that "[h]e [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." *Id.*; see *infra* notes 303-08 and accompanying text (discussing the process of treaty ratification).

leader among nations.⁸ The ratification was limited, however, by a plethora of qualifications restricting the applicability of ICCPR in the United States.⁹ The most significant of these limitations was the declaration that the first twenty-seven articles of ICCPR were not "self-executing," but required implementing congressional legislation.¹⁰ The Bush Adminis-

8. Letter from President George Bush to Senator Claiborne Pell, Chairman, Senate Foreign Relations Comm. (Aug. 8, 1991), *reprinted in* 31 I.L.M. 660 (1992). President Bush argued that ratification would underscore the United States' leadership of the global trend toward democracy. *Id.* President Bush stated that the "United States ratification of the Covenant on Civil and Political Rights at this moment in history would underscore our natural commitment to fostering democratic values through international law." *Id.* President Bush described ICCPR as a codification of "the essential freedoms people must enjoy in a democratic society, such as the right to vote, freedom of peaceful assembly, equal protection of the law, the right to liberty and security, and the freedom of opinion and expression." *Id.* President Bush did not mention the right to be free from torture, or cruel, inhuman, or degrading treatment or punishment. *Id.*

9. SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. REP. NO. 23, 102d Cong., 2d Sess. 25 (1992), *reprinted in* 31 I.L.M. 645 (1992) [hereinafter SENATE REPORT]. The Bush Administration appended five reservations, five understandings, and four declarations. *Id.* at 651-58. Furthermore, the Senate added the "Helms proviso." *Id.* at 660; 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992). This stipulated that "[n]othing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." *Id.* at S4784.

10. SENATE REPORT, *supra* note 9, at 657. The "non-self-executing" declaration abruptly states that "[t]he United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing." *Id.* Senator Daniel Patrick Moynihan sought to minimize the impact of the "non-self-executing" declaration by stating that "[e]ven though the covenant is non-self-executing, these will now become binding international obligations of the United States." 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992). But the various limitations placed on ratification, chiefly the "non-self-executing" declaration, were so extensive that some human rights lawyers, who had long campaigned for United States ratification of ICCPR, suggested that continued non-ratification might have been preferable. *See, e.g.,* Nadine Strossen, *United States Ratification of the International Bill of Rights: A Fitting Celebration of the Bicentennial of the U.S. Bill of Rights*, 24 U. TOL. L. REV. 203, 207 & n.18 (1992) (citing Letter from Marvin E. Frankel, Chairman, Lawyers Comm. for Human Rights, to Senator Claiborne Pell, Senate Foreign Relations Comm. (Mar. 2, 1992)). Frankel argued that "if the choice before the Senate is now between ratifying the Covenant subject to the Administration's misguided principle or delaying ratification . . . we support delay." *Id.*

The United States' reluctance to embrace the Covenants of the International Bill of Human Rights is curious in light of the United States' (and in particular President Franklin Roosevelt and First Lady Eleanor Roosevelt's) prominent role in the establishment of the United Nations and its organizational infrastructure. *See, e.g.,* Theodor Meron, Comment, *Reform of Lawmaking in the United Nations: The Human Rights Instance*, 79 AM. J. INT'L L. 664, 670 (1985) (stating that "[c]learly, the fact that the [United Nations] Commission [on Human Rights] initially had as members of the caliber of . . . Eleanor Roosevelt is an important reason for the speedy adoption of a truly remarkable instrument: the Universal Declaration of Human Rights"); Carl Q. Christol, Book Review, 74 AM. J. INT'L L. 980, 980 (1980) (reviewing A. GLENN MOWER, JR., *THE UNITED STATES, THE UNITED NATIONS, AND HUMAN RIGHTS. THE ELEANOR ROOSEVELT AND JIMMY CARTER ERAS*

tration's main justification for the "non-self-executing" declaration was its reluctance to create a new private cause of action in United States courts.¹¹ Paradoxically, the United States argued that the protections of

(1979)) (stating that Mrs. Roosevelt "contributed materially to the writing of the Universal Declaration of Human Rights. She was also heavily engaged in the establishment of a UN system for the promotion and protection of such rights"); Marian N. Leich, Note, *Marjorie M. Whiteman (1898-1986)*, 80 AM. J. INT'L L. 938, 938 (1986); Christopher J. Papajohn, Book Review, 85 AM. J. INT'L L. 721, 721 (1991) (reviewing DANIEL PATRICK MOYNIHAN, *ON THE LAW OF NATIONS* (1990) (noting that "by 1945, public opinion was 'once again fiercely internationalist.' President Franklin D. Roosevelt had solid support in Congress for our participation in the United Nations."); see also NEWMAN & WEISSBRODT, *supra* note 3, at 361-63 (citing two of President Roosevelt's speeches, the so-called "Four Freedoms" Speech of 1941 and the State of the Union address of 1944 as reflective of economic, social, and cultural rights that subsequently were embodied in ICESCR)).

Furthermore, in recent times, the United States Constitution has provided a framework for the development of a body of international human rights law, as well as a model that other nations have applied in developing their legal systems. See, e.g., Richard B. Lillich, *The Constitution and International Human Rights*, 83 AM. J. INT'L L. 851, 851-55 (1989) (discussing the contribution of United States constitutional law to the development of a framework of international human rights law). Morris Abram describes the United States' influence as follows: "in Eastern Europe and Latin America, governments are moving toward democracy and the effective protection of human rights. I am convinced that these changes are partly the result of the longstanding, careful and consistent articulation of a single standard for human rights by the United States." Morris B. Abram, *Human Rights and the United Nations: Past as Prologue*, 4 HARV. HUM. RTS. J. 69, 83 (1991); see also Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 561 (1988) (arguing that the adoption by other nations of laws and constitutional provisions modeled after the United States Bill of Rights are "an important means of strengthening international human rights").

Lester, however, quotes Louis Henkin, who captures the paradoxical nature of the United States' attitude towards international human rights:

For the United States, human rights have been a kind of "white man's burden," and international human rights have been "for export only." An abiding isolationism (or unilateralism) . . . continues to appeal to many Americans, even some who readily judge others and are eager to intervene on behalf of democracy and human rights in other countries. There is some reluctance to accept, and have our courts apply, standards perceived to have been created by others, even if they were borrowed from us and reflect our own values. There is some reluctance to have the United States subject to scrutiny by others, even though Americans pride themselves on an open society.

Id. (quoting Louis Henkin, *The United States and International Human Rights*, in *Justice for a Generation*, Papers presented in London, England, July 15-19, 1985 at the plenary sessions of a meeting between the American Bar Association, the Senate of the Inns of Court and the Bar, and the Law Society of England and Wales, at 377).

For a history of the development of international human rights in the post-World War II era, see Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982).

11. SENATE REPORT, *supra* note 9, at 657. The "non-self-executing" declaration states that "[t]he intent is to clarify that the Covenant will not create a private cause of action in U.S. courts." *Id.*; see *infra* notes 319-35 and accompanying text (discussing the doctrine of self-execution in detail).

ICCPR already were available under United States law.¹²

This Comment questions the legal and logical foundations of the “non-self-executing” declaration by comparing the protections available under the Eighth Amendment of the United States Constitution¹³ with those available under article 7 of ICCPR.¹⁴ This Comment first reviews Eighth Amendment case law, focusing on the continuing debate among members of the United States Supreme Court as to how, if at all, international law should be incorporated into Eighth Amendment interpretation. This Comment then analyzes some of the key decisions of the European Court of Human Rights¹⁵ and the United Nations Human Rights Committee¹⁶

12. SENATE REPORT, *supra* note 9, at 649. In discussing the background of ICCPR, the Senate Report states that “[t]he rights guaranteed by the Covenant are similar to those guaranteed by the U.S. Constitution and the Bill of Rights.” *Id.*

13. U.S. CONST. amend. VIII. The Eighth Amendment of the United States Constitution stipulates that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” *Id.*

14. ICCPR, *supra* note 1, art. 7. Article 7 stipulates that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” *Id.* The origins of article 7 lie in article 5 of the Universal Declaration, which states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Universal Declaration, *supra* note 3, art. 5. ICCPR does not define the meaning of torture, but United Nations Resolution 3452 of the General Assembly states that “[t]orture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.” Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, at 91, U.N. Doc. A/10034, art. 1 para. 2 (1976) [hereinafter Resolution 3452].

For a detailed analysis of article 7, its meaning, and its implications, see General comment No. 20 (44) (art. 7) in *Annex VI: General Comments Adopted Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights*, U.N. Doc. CCPR/C/21/Rev.1 (1992) (discussing the aims and meaning of article 7); MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS, CCPR COMMENTARY 126-41 (1993) (discussing article 7 in detail).

15. See *infra* notes 194-250 and accompanying text. Decisions of the European Court of Human Rights provide interpretation of article 3 of the European Convention on Human Rights, which states that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Convention For The Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, art. 3, *entered into force* Sept. 3, 1953 [hereinafter European Convention]. This language is substantially similar to the wording of article 7 of ICCPR. ICCPR, *supra* note 1, art. 7 (text of article 7 reprinted *supra* note 14). Both trace their origins to article 5 of the Universal Declaration. Universal Declaration, *supra* note 3, art. 5.

For further discussion of article 3 of the European Convention, see P. VAN DIJK & G.J.H. VAN HOOFF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS* 226-40 (2d ed. 1990); Love Kellberg, *The Case-Law of the European Commission of Human Rights on Art. 3 of the ECHR*, *THE INTERNATIONAL FIGHT AGAINST TORTURE* 97-120 (A. Cassese ed., 1991).

16. See *infra* notes 251-89 and accompanying text. The United Nations Human Rights Committee [hereinafter UNHRC or Committee] was established in 1977 under article 28 of ICCPR. ICCPR, *supra* note 1, art. 28. Article 28 stipulates that the Committee must

applying the international standard.¹⁷ Next, this Comment provides a

comprise 18 members, composed of nationals of States parties. *Id.* art. 28(1), (2). Members of the Committee are elected and serve in their personal capacity. *Id.* art. 28(3). The responsibilities of the Committee are established by articles 40 through 45 of ICCPR. *Id.* arts. 40-45. Under article 41, a State party may declare that it recognizes the competence of the Committee to receive and consider written communications from another State party alleging that it has violated its obligations under ICCPR. *Id.* art. 41.

The Optional Protocol provides a parallel mechanism whereby a State party may consent to the Committee's receipt of written communications from individuals who claim that the State party has violated their rights under ICCPR. Optional Protocol, *supra* note 1, Preamble, art. 1.

Curiously, the Optional Protocol does not address the question whether the UNHRC is obligated to publish its decisions or "views." Theodor Meron, Book Review, 80 AM. J. INT'L L. 267, 267 (1986) (reviewing *The International Covenant on Civil and Political Rights, Human Rights Committee: Selected Decisions under the Optional Protocol (Second to sixteenth sessions)*, U.N. Doc. CCPR/C/OP/1 (1985)). Meron explains that "Article 5(4) of the Optional Protocol requires only that the Committee forward its views to the state party and to the individual concerned. Fortunately, the Committee decided (1979) that the Protocol did not preclude publication of the 'views' provided that such publication was desirable." *Id.*

The United States has not ratified the Optional Protocol. CHART OF RATIFICATIONS, *supra* note 2, at 10-11. Since only States parties to the Optional Protocol (*i.e.*, those countries that have ratified the Protocol) may be subjected to this procedure, it is not possible to bring an individual communication against the United States to the Human Rights Committee. Optional Protocol, *supra* note 1, art. 1.

17. The term "international standard" in this Comment is used to refer to both article 7 of ICCPR and article 3 of the European Convention on Human Rights. The wording of the two articles is virtually interchangeable. *See supra* note 14 and accompanying text (discussing article 7) and note 15 and accompanying text (discussing article 3). Furthermore, decisions of the European Court of Human Rights have referred to the United Nations standard and its interpretation by United Nations bodies as a source of authority in interpreting article 3. *See infra* notes 198-250 and accompanying text (discussing Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) (1978); Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989); Tyrer v. Isle of Man, 26 Eur. Ct. H.R. (ser. A) (1978)).

The level of consistency among the various international instruments in this area is remarkable. *See, e.g.*, Universal Declaration, *supra* note 3, art. 5; Standard Minimum Rules for the Treatment of Prisoners, *adopted by* First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/6/1, *adopted* July 31, 1957, E.S.C. Res. 663C, U.N. ESCOR, 24th Sess., Supp. No. 1, at 11, U.N. Doc. E/3048 (1957); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987 [hereinafter Torture Convention]; Resolution 3452, *supra* note 14; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. GAOR, 43d Sess., Supp. No. 49, at 297, U.N. Doc. A/43/49 (1989); American Convention on Human Rights, O.A.S. Off. Rec. OEA/Ser./V/II.23, doc. 21, rev. 6 (1979), *entered into force* July 18, 1978; *see* Tullio Treves, *The UN Body of Principles for the Protection of Detained or Imprisoned Persons*, 84 AM. J. INT'L L. 578 (1990) (discussing the Body of Principles in some detail); *see also* Suzanne M. Bernard, *An Eye For An Eye: The Current Status of International Law On the Humane Treatment of Prisoners*, 25 RUTGERS L.J. 759, 792 (1994) (explaining that "the right not to be subjected to 'cruel, inhuman, or degrading treatment' appear[s] over and over in international treaties").

brief review of some of the key differences between the language used in the Eighth Amendment and the language of article 7 of ICCPR, and concludes that the more detailed and specific language of article 7 reflects the broader scope of protection available under the international standard. This Comment then analyzes the significance of the concept of self-execution under international law and questions the legitimacy of the "non-self-executing" declaration under international law. This Comment next scrutinizes two specific situations where article 7 has been interpreted as providing broader protection than the Eighth Amendment: the so-called death row phenomenon and the application of capital punishment to juveniles. This Comment concludes that the international standard, embodied in article 7, provides broader protection than the Eighth Amendment and that, therefore, the United States' declaration that article 7 of ICCPR is "non-self-executing" is not justifiable on grounds that the Eighth Amendment provides comparable protection.¹⁸

I. THE JURISPRUDENTIAL EVOLUTION OF THE EIGHTH AMENDMENT AND THE INTERNATIONAL STANDARD

A. Review of Eighth Amendment Jurisprudence

There are three identifiable phases in the development of Eighth Amendment jurisprudence with respect to the Cruel and Unusual Punishments Clause.¹⁹ Each phase represents an expansion in the scope of

18. This Comment does not seek to provide a critique of the human rights record of the United States. Arguably, the United States' cautious approach to the ratification of ICCPR is preferable to what one commentator has described as "the 'hypocrisy manifested by states which adopt human rights instruments' yet continue to tolerate widespread violations of the very rights they have bound themselves to protect." Bernard, *supra* note 17, at 761 (citing Richard H. Goolsby, Note, *Progress Report on United Nations Human Rights Activities to Protect Prisoners*, 7 GA. J. INT'L & COMP. L. 467, 467 (1977)); see also Abram, *supra* note 10, at 71 & nn.7-13. Abram observes that:

Today the ratification numbers game continues, played by countries with neither the intention nor the desire to abide by them. Iraq had ratified many key human rights treaties, including the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Prevention and Punishment of the Crime of Genocide; and the four Geneva Conventions.

Id. (contrasting Iraq's excellent record of ratifying international human rights treaties with its appalling record of human rights abuses and violations of international law, including the 1990 invasion of Kuwait); see also 138 CONG. REC. S4783 (daily ed. April 2, 1992) (remarks of Sen. Daniel Patrick Moynihan) (criticizing nations that ratify treaties without intention to honor their obligations, but cautioning the United States that it is "[f]ar better to ratify with the firm intention of living up to the covenant's terms").

19. See *infra* notes 24-58 and accompanying text (discussing three phases in the development of Eighth Amendment jurisprudence).

Eighth Amendment protection.²⁰ The first phase recognized protections against barbaric and torturous punishments.²¹ The second phase interpreted the Eighth Amendment as prohibiting punishments inflicting wanton and unnecessary pain,²² and the third phase expanded Eighth Amendment protection to prison conditions.²³

1. *Barbaric and Torturous Punishments*

The United States Supreme Court initially interpreted the Eighth Amendment as prohibiting only barbaric or torturous punishments.²⁴ In *Weems v. United States*,²⁵ the Supreme Court, for the first time, extended the scope of the Eighth Amendment to prevent disproportionate punishments.²⁶ In *Weems*, a Philippine court convicted the defendant of falsifying an official document.²⁷ Weems received a fifteen-year prison sentence with hard labor.²⁸ The Supreme Court held that Weems' sentence was disproportionate to the crime for which he was convicted and, therefore, violated the Cruel and Unusual Punishments Clause of the Eighth Amendment.²⁹

20. See *infra* notes 24-58 and accompanying text (discussing the expanding scope of Eighth Amendment jurisprudence through three phases of development).

21. See *infra* notes 24-39 and accompanying text (describing the first phase of Eighth Amendment jurisprudence, which established a prohibition against barbaric and torturous punishments).

22. See *infra* notes 40-46 and accompanying text (describing the second phase of Eighth Amendment jurisprudence, which established that punishments inflicting wanton or unnecessary pain violate the United States Constitution).

23. See *infra* notes 47-58 and accompanying text (describing the third phase of Eighth Amendment jurisprudence, which established a constitutional prohibition against certain prison conditions).

24. See, e.g., *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879) (holding that "punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by . . . [the Eighth Amendment]"); *In re Kemmler*, 136 U.S. 436, 447 (1890) (holding that "[p]unishments are cruel when they involve torture or a lingering death"); *Weems v. United States*, 217 U.S. 349 (1910) (holding for the first time that the Eighth Amendment prohibits disproportionate punishments).

25. 217 U.S. 349 (1910).

26. *Id.* at 380-81.

27. *Id.* at 357. The defendant was an "acting disbursing officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands." *Id.*

28. *Id.* at 358. The terms of Weems' sentence stipulated that the prisoner "shall always carry a chain at the ankle, hanging from the wrists; [he] shall be employed at hard and painful labor, and shall receive no assistance whatsoever from without the institution." *Id.* at 364. This form of punishment, an ancient ritual of Spanish origin known as *cadena temporal*, was used in the Philippines at that time but had not been deployed in the United States. *Id.* at 380. The *Weems* Court, in declaring *cadena temporal* unconstitutional under the Eighth Amendment's Cruel and Unusual Punishments Clause, remarked that "[t]here are degrees of homicide that are not punished so severely." *Id.*

29. *Id.* at 381. Prior to *Weems*, the Supreme Court had not expressed much concern about the proportionality of punishment. See *Pervear v. Commonwealth*, 72 U.S. 475, 478-

Having established a proportionality test under the Eighth Amendment, the Supreme Court subsequently ruled that contemporary standards of behavior could play a role in Eighth Amendment interpretation.³⁰ In *The Paquete Habana*,³¹ the Supreme Court established that, under certain circumstances, the customs and norms of civilized nations can establish standards for constitutional interpretation.³² The Court held that an informal, but traditional, prohibition against the seizure of enemy fishing vessels during wartime developed into a "settled rule of international law."³³ The significance of *The Paquete Habana* is that, when placing international law in a constitutional context, the Court

80 (1867) (holding that a sentence of three months of hard labor for the illegal sale of intoxicating liquor does not violate the Eighth Amendment).

During the nineteenth century, the Supreme Court held that keeping condemned prisoners in solitary confinement prior to execution does not violate the Eighth Amendment. See *McElvaine v. Brush*, 142 U.S. 155, 160 (1891); *Trezza v. Brush*, 142 U.S. 160, 161 (1891). But see *Hutto v. Finney*, 437 U.S. 678, 688 (1978) (ruling that holding prisoners in solitary confinement for periods exceeding 30 days violates the Eighth Amendment); *infra* notes 55-58 and accompanying text (discussing the *Hutto* decision).

The nineteenth century Supreme Court also displayed little concern that prison overcrowding might violate the Eighth Amendment. See *Johnson v. Sayre*, 158 U.S. 109, 116 (1895) (rejecting petitioner's Eighth Amendment claim that a two-year sentence of confinement in a "narrow cell" with "limited appliances for comfort" constituted cruel and unusual punishment). But eighty-six years later, Justice Rehnquist echoed the *Johnson* Court's sentiments in his opinion in *Atiyeh v. Capps*, 449 U.S. 1312, 1316 (1981). Justice Rehnquist stated that the Eighth Amendment does not require that prisoners "be housed in a manner most pleasing to them." *Id.*; see also *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981) (holding that the housing of two prisoners in a single cell does not violate the Eighth Amendment); *infra* notes 61-63 and accompanying text (discussing the *Rhodes* decision).

30. *The Paquete Habana*, 175 U.S. 677, 712 (1900).

31. *Id.* at 694. The Court stated that:

[i]n the present century a slow and silent, but very substantial mitigation has taken place in the practice of war; and in proportion as that mitigated practice has received the sanction of time, it is raised from the rank of mere usage, and becomes part of the law of nations.

Id. (quoting Sir James Mackintosh, *Discourse on the Law of Nations*, 38; 1 MISCELLANEOUS WORKS 360). Justice Gray also noted that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *Id.* at 700.

32. *Id.* at 712. The Court ruled that the United States' blockading squadron's seizure of two Spanish fishing vessels off the coast of Cuba was unlawful according to a custom of war older than the United States Constitution that developed into international law. *Id.* at 714. Specifically, the Court found that:

[I]t is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

Id. at 708.

33. *Id.* at 694. The Court described this law as a standard that began as one of comity

recognized that international law must be interpreted in light of contemporary standards rather than standards existing when the Framers drafted the Constitution.³⁴

In *Trop v. Dulles*,³⁵ the Court merged the reasoning of *Weems* and *The*

and ripened over the preceding century into a settled rule of international law by the general assent of civilized nations. *Id.*

34. See *id.* at 712. The Supreme Court confronted the tension between customary international law and the use of the original intent of the Framers to interpret the United States Constitution, concluding that where international law applies, customs of international law must prevail. *Id.* "Thus it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (interpreting *Paquete*).

In a key passage of Justice Gray's opinion, he appeared to endorse a sweeping form of executive authority:

[I]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no *controlling executive or legislative act* or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

The Paquete Habana, 175 U.S. at 700 (emphasis added). Some commentators have expressed grave reservations about the existence of a "controlling executive act." See, e.g., Monroe Leigh, *Is the President Above Customary International Law?*, 86 AM. J. INT'L L. 757, 758 (1992); Jordan J. Paust, *The President Is Bound By International Law*, 81 AM. J. INT'L L. 377, 384-87 (1987); Frederic L. Kirgis, Jr., *Agora: May the President Violate Customary International Law?*, 81 AM. J. INT'L L. 371, 371 (1987).

However, Jordan Paust argued that "[f]ar too much consideration has been paid to [this] ambiguous dictum." Jordan J. Paust, *Paquete and the President: Rediscovering the Brief for the United States*, 34 VA. J. INT'L L. 981, 981 (1994) (examining the government's brief in the *Paquete* case and concluding that no such sweeping assertion of executive authority was either sought by the government or endorsed by Justice Gray's opinion). Paust concluded by cautioning against the misuse of the "ambiguous dictum" in *Paquete* to support an overbroad assertion of executive power:

A favored and admitted exercise of executive power, indeed its very discretion in time of war, was placed openly before the Court to be judged according to international law. How strange then, and so out of focus, are the machinations claimed by those who seem to prefer uncontrolled presidential illegality and seek to rest this preference on ambiguous dictum in a case where no such claim was made or apparently contemplated. In context, *Paquete* was a splendid reaffirmation of international law. In actuality, it denies a newer and perilous preference for raw power.

Id. at 989.

35. 356 U.S. 86 (1958). In *Trop*, a native-born citizen of the United States was convicted by court-martial of deserting the military during wartime. *Id.* at 87. When the petitioner deserted in 1944, he was serving as a private in the United States Army in French Morocco. *Id.* Petitioner escaped from a stockade at Casablanca, where he had been confined following a previous breach of discipline. *Id.* On conviction, petitioner was sen-

Paquete Habana, holding that a federal statute allowing the government to deprive an individual of his citizenship violated the Eighth Amendment.³⁶ The Court held denationalization unconstitutional based on two arguments that have since informed the debate over Eighth Amendment interpretation. First, echoing *The Paquete Habana*, the *Trop* Court noted that "evolving standards of decency that mark the progress of a maturing society" should inform interpretation of the Eighth Amendment.³⁷ Second, the Court applied the *Weems* proportionality doctrine³⁸ in concluding that denationalization was excessive in relation to the crime.³⁹

2. Wanton and Unnecessary Pain

At the time of *Weems*, the definitional parameters of the Cruel and Unusual Punishments Clause remained unclear.⁴⁰ The Court, however,

tenced to "three years at hard labor, forfeiture of all pay and allowances and a dishonorable discharge." *Id.* at 88. In 1952, petitioner applied for a passport. *Id.* His application was denied under § 401(g) of the Nationality Act of 1940. *Id.* The Supreme Court ruled that § 401(g) was unconstitutional. *Id.* at 103.

36. *See id.* at 91-104.

37. *Id.* at 101. The Court recognized that the Eighth Amendment is a vague and dynamic standard that is difficult to apply. *Id.* at 100-01. This language echoes the statement by the Court in *Weems* that the Eighth Amendment "may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910). The *Trop* Court also described the Eighth Amendment as guaranteeing "the principle of civilized treatment." *Trop*, 356 U.S. at 99. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Id.* at 100.

38. *See infra* notes 169-91 and accompanying text (discussing the proportionality doctrine). In defining proportionality, one scholar attempted to place the concept in the philosophical context of a theory of retributive justice. Joseph L. Hoffmann, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229, 247-50 (1989) (citing ANDREW VON HIRSCH, *DOING JUSTICE* (1976)). Hoffmann distinguishes between two types of proportionality of punishment: cardinal and ordinal. *Id.* at 248-50. "Cardinal proportionality" "deals with the relationship between the seriousness of a given offender's crime and the punishment imposed against the offender." *Id.* at 249. "Ordinal" or "comparative" punishment, by contrast, "deals with comparisons between the deserts and punishments of different offenders." *Id.* at 250. Hoffmann argues that, whereas ordinal proportionality should be relatively easy to achieve, cardinal proportionality "can never be such an exact science." *Id.* Rather, cardinal proportionality serves only "as a crude limiting device, not as a precise measure of punishment." *Id.*

39. *Trop*, 356 U.S. at 99 (reasoning that "the penalty of denationalization is excessive in relation to the gravity of the crime"). The *Trop* Court decided that "a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records . . . was cruel in its excessiveness and unusual in its character." *Id.* at 100 (citing *Weems*, 217 U.S. at 377). *Weems* represented the first occasion where the Supreme Court ruled that a punishment violated the Eighth Amendment because it was disproportionate to the crime. *Weems*, 217 U.S. at 377.

40. *See Weems*, 217 U.S. at 349. In *Weems*, Justice McKenna's majority opinion stated that "[t]ime works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it

eventually clarified its definition by recognizing that the Eighth Amendment protected prisoners against infliction of wanton or unnecessary pain.⁴¹ In *Louisiana ex rel. Francis v. Resweber*,⁴² the Supreme Court ruled that the accidental malfunction of an electric chair did not constitute an Eighth Amendment violation.⁴³ Even in denying the petitioner's claim, the Court recognized for the first time that wanton infliction of pain constitutes cruel and unusual punishment.⁴⁴ The Court concluded, however, that the accidental malfunction was not a wanton act.⁴⁵ Thus, the Court recognized that the Eighth Amendment prohibited not only barbaric and torturous punishments, but also punishments involving unnecessary or wanton infliction of pain.⁴⁶

3. Prison Conditions

During the 1970s, the Supreme Court expanded its Eighth Amendment interpretation by recognizing that the Cruel and Unusual Punishments Clause applied to prison conditions.⁴⁷ In *Estelle v. Gamble*,⁴⁸ the Supreme Court held that a prison official's "deliberate indifference" to the serious medical needs of a prisoner could constitute an Eighth Amendment violation.⁴⁹ In *Estelle*, the prisoner alleged that he suffered

birth." *Id.* at 373; see also *Trop*, 356 U.S. at 100-01 (acknowledging that, in *Weems*, the Court recognized that "the words of the [Eighth] Amendment are not precise"); *In re Kemmler*, 136 U.S. 436, 447 (1890) (establishing that the Eighth Amendment is a prohibition against torture, but failing to provide a clear definition of torture).

41. See *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (ruling that the accidental malfunction of an electric chair does not violate the Cruel and Unusual Punishments Clause of the Eighth Amendment).

42. 329 U.S. 459 (1947).

43. *Id.* at 463. In *Resweber*, the petitioner sought to enjoin the State of Louisiana from a proposed second attempt at execution after a malfunctioning electric chair resulted in an unsuccessful first effort. *Id.* at 460-61. *Resweber* is significant to the development of Eighth Amendment interpretation because it represents the first time that the Supreme Court used the language of "unnecessary" and "wanton" pain. *Id.* at 463-64.

44. *Id.* at 463.

45. *Id.* at 464.

46. *Id.* at 463-64.

47. See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (recognizing that "deliberate indifference to serious medical needs of prisoners" violated the Eighth Amendment). In 1962, the Supreme Court had opened the door to broader application of the Eighth Amendment by holding that the Fourteenth Amendment incorporated the Eighth Amendment, thereby applying it to the states. *Robinson v. California*, 370 U.S. 660, 667 (1962).

48. 429 U.S. 97 (1976).

49. *Id.* at 104. The petitioning prisoner alleged that prison officials exhibited deliberate indifference to his medical needs following a back injury suffered while on a work detail in prison. *Id.* at 98-101. The deliberate indifference standard, although discussed in the context of the Eighth Amendment, is the progeny of a federal statute. 42 U.S.C. § 1983 (1988). The Supreme Court recognized that, under § 1983, individuals may recover damages in federal court against federal officials who violate their constitutional rights. *Bivens*

a back injury while on a prison work detail.⁵⁰ The Court ruled that prison officials' failure to perform x-rays or other diagnostic tests on the prisoner did not constitute deliberate indifference and, therefore, did not violate the Cruel and Unusual Punishments Clause.⁵¹

v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397-98 (1971) (ruling that a statutory cause of action existed based on official violation of plaintiff's Fourth Amendment rights).

The Supreme Court extended the *Bivens* doctrine to claims based on the First, Fifth, and Eighth Amendments. See *Carlson v. Green*, 446 U.S. 14, 18-20 (1980) (holding that the mother of a deceased prisoner could bring a *Bivens*-type action alleging that prison officials violated her son's Eighth Amendment rights by failing to provide him with adequate medical care); *Davis v. Passman*, 442 U.S. 228, 248-49 (1979) (holding that a female employee of a Congressman could bring a *Bivens*-type action claiming that her termination constituted sex discrimination in violation of the Fifth Amendment); *Dellums v. Powell*, 566 F.2d 167, 194-96 (D.C. Cir. 1977) (holding that Vietnam War protesters could bring a *Bivens*-type action claiming that their arrest on the steps of the United States Capitol in 1971 constituted a violation of their First Amendment rights), *cert. denied*, 438 U.S. 916 (1978).

Although § 1983 offered prisoners a new statutory remedy, it has been criticized for imposing an onerous burden of proof on claimants. See, e.g., Barbara Kritchevsky, *Making Sense of State of Mind: Determining Responsibility in Section 1983 Municipal Liability Litigation*, 60 GEO. WASH. L. REV. 417, 459-62 (1992) (arguing that liability should be judged by objective, not subjective, criteria); Clay J. Pierce, *The Misapplication of Qualified Immunity: Unfair Procedural Burdens for Constitutional Damage Claims Requiring Proof of the Defendant's Intent*, 62 FORDHAM L. REV. 1769, 1773-77 (1994) (arguing that courts should not raise procedural burdens for plaintiffs who bring constitutional claims based on an official's unlawful intent).

50. *Estelle*, 429 U.S. at 98-101. On November 9, 1973, a bale of cotton fell on Gamble while he was working on a prison detail. *Id.* at 99. On November 10, 1973, a prison doctor diagnosed Gamble as suffering from a lower back strain. *Id.* The doctor prescribed a 21-day course of treatment involving muscle relaxants and pain relievers, but Gamble's back pain persisted. *Id.* Gamble refused to return to work and, as a result, the prison disciplinary committee placed him in "administrative segregation." *Id.* at 100. On February 11, 1973, Gamble submitted his complaint, claiming official indifference to a serious medical condition. *Id.* at 98, 101.

51. *Id.* at 107. Following *Estelle*, the Supreme Court recognized that a prison official's deliberate indifference to the medical needs of prisoners may violate both the Eighth and Fourteenth Amendments. See, e.g., *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 243-46 (1983) (holding the city liable on due process, rather than Eighth Amendment, grounds for the medical care of a fleeing suspect shot by a police officer); *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 191-203 (1989) (holding that a state official's failure to prevent a father from inflicting brain damage on his son by successive physical beatings did not violate the son's liberty interests under the Due Process Clause); *West v. Atkins*, 487 U.S. 42, 48-58 (1988) (ruling that a state-contracted private physician's negligent medical treatment of a prisoner could violate the prisoner's due process rights).

The United States Court of Appeals for the Ninth Circuit, meanwhile, used the deliberate indifference standard to rule that a prison security policy, whereby male guards conducted random clothed-body searches of female inmates, violated the Eighth Amendment. *Jordan v. Gardner*, 986 F.2d 1521, 1522-23 (9th Cir. 1993); see David J. Stollman, Comment, *Jordan v. Gardner: Female Prisoners' Rights To Be Free From Random, Cross-Gen-*

While the Court denied *Estelle*'s claim, it recognized, for the first time that, under more severe circumstances, the deliberate indifference of prison officials could violate the Eighth Amendment.⁵² Justice Marshall's majority opinion cited the *Trop* standard as the test for violations of the Cruel and Unusual Punishments Clause.⁵³ Justice Marshall reasoned that the "deliberate indifference" standard was required to guard against "unnecessary and wanton infliction of pain."⁵⁴

Following *Estelle*, the Supreme Court further expanded its application of the Eighth Amendment to prison condition cases. In *Hutto v. Fin-*

der Clothed Body Searches, 62 FORDHAM L. REV. 1877, 1910 (1994) (criticizing *Jordan* for potentially opening the floodgates to prisoner litigation under the Eighth Amendment and suggesting that a Fourth Amendment claim of unreasonable search would provide a more appropriate recourse); Ian M. Ogilvie, Comment, *Cruel and Unusual Punishment: The Ninth Circuit Analyzes Prison Security Policy with "Deliberate Indifference" to Penological Needs In Jordan v. Gardner*, 68 ST. JOHN'S L. REV. 259, 280 (1994) (criticizing the court's use of the deliberate indifference standard).

52. *Estelle*, 429 U.S. at 104-05. Perhaps the Supreme Court's most liberal decision under the "deliberate indifference" standard came in *Helling v. McKinney*, 113 S. Ct. 2475 (1993). In *Helling*, the Court permitted a prisoner to bring an Eighth Amendment claim alleging risk of future harm from passive smoking. *Id.* at 2481-82. The petitioner was forced to share his cell with another inmate who smoked five packs of cigarettes per day. *Id.* at 2478. *Helling* is significant because it emphasizes that the Eighth Amendment may be used to provide injunctive relief from a potential future deprivation. *Id.* at 2481; see also Jacqueline M. Kane, Note, *You've Come A Long Way, Felon: Helling v. McKinney Extends the Eighth Amendment to Grant Prisoners the Exclusive Constitutional Right to a Smoke-Free Environment*, 72 N.C. L. REV. 1399, 1400 (1994) (arguing that Eighth Amendment protection should be limited to prevent discontented prisoners from using it as a catch-all provision). Kane criticized the *Helling* decision for "providing prisoners more constitutional protection than other citizens." *Id.* But see Cornish F. Hitchcock, *Environmental Tobacco Smoke as Cruel and Unusual Punishment*, 13 ST. LOUIS U. PUB. L. REV. 661, 661-62 (1994) (recognizing that *Helling* merely ensured that the petitioner would "have his day in court," but that the decision did not vouch for either the substantive merit of *Helling*'s particular claim, or for the prospects for success of such claims in general); see also Lisa Gizzi, Note, *Helling v. McKinney and Smoking in the Cell Block: Cruel and Unusual Punishment?*, 43 AM. U. L. REV. 1091 (1994). Gizzi interprets *Helling* as a subtle hint from the Supreme Court to prison officials about the need to minimize health risks attached to conditions of confinement, such as exposure to tobacco smoke. *Id.* at 1131. Gizzi describes the decision as a "bittersweet victory" for prisoner rights because the Court deferred responsibility for defining "substantial risk" to state legislatures. *Id.* at 1133. Gizzi concluded that "[u]ntil the objective element of *Helling* is refined and made more accessible for prisoners, the *Helling* decision will remain only a theoretical victory for prisoners' right to be protected from dangerous living conditions under the Cruel and Unusual Punishments Clause of the Eighth Amendment." *Id.* at 1133-34.

53. *Estelle*, 429 U.S. at 102. Justice Marshall stated that "[t]he [Eighth] Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency, against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society.' " *Id.* (citation omitted) (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

54. *Id.* at 103 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

ney,⁵⁵ the Supreme Court used the *Estelle* “deliberate indifference” standard to hold that periods of solitary confinement exceeding thirty days violate the Eighth Amendment.⁵⁶ The *Hutto* decision reiterated the Supreme Court’s willingness to use the Cruel and Unusual Punishments Clause as a means of examining all aspects of prison conditions.⁵⁷ Once again, the Court relied on the language of *Trop* to justify this approach.⁵⁸

4. *The 1980s: Progress Reversed*

The Supreme Court’s interpretation of the Eighth Amendment followed a century’s steady course of cautious expansion from *Weems* in 1910 to *Hutto* in 1978. The 1980s, and the advent of the Rehnquist Court in 1986, heralded a reversal in that long-established trend of progress.⁵⁹ The Rehnquist Court’s efforts to reign in Eighth Amendment interpretation focused on three principal areas: prison conditions, the death penalty, and the proportionality doctrine.

a. *Prison Condition Cases*

During the 1980s, the Supreme Court narrowed its interpretation of the Eighth Amendment.⁶⁰ This narrow approach affected both the “wanton

55. 437 U.S. 678 (1978).

56. *Id.* at 684-85. *Hutto* concerned allegations that certain conditions in the Arkansas prison system violated the Cruel and Unusual Punishments Clause. *Id.* at 680. The petitioning prisoners provided a catalog of complaints encompassing every aspect of prison life in Arkansas. *Id.* at 682-83. Specifically, the complaint cited overcrowded and unhygienic conditions for eating, sleeping, and living. *Id.* Specifically, it focused on prison violence and, in particular, on the arbitrary administration of disciplinary punishments, often enforced by armed prisoners. *Id.* at 682-87 & n.6.

The State did not dispute that the Arkansas prison conditions violated the Eighth Amendment. *Id.* at 685. Rather, it unsuccessfully argued that the imposition on inmates of periods of disciplinary isolation exceeding 30 days was not cruel and unusual punishment. *Id.*

57. *Id.* at 685. The Court ruled that “[c]onfinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards.” *Id.*

58. *Id.* The *Hutto* Court stated that the Eighth Amendment “prohibits penalties that are grossly disproportionate to the offense, as well as those that transgress today’s ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency.’” *Id.* (citation omitted) (citing *Estelle*, 429 U.S. at 102); *cf.* *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (holding that Eighth Amendment interpretation should be framed by “evolving standards of decency that mark the progress of a maturing society”).

59. See *infra* notes 60-191 and accompanying text (discussing the Eighth Amendment jurisprudence of the Rehnquist Court).

60. See, e.g., *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981) (holding that “double celling” did not violate the Eighth Amendment); *Whitley v. Albers*, 475 U.S. 312, 325-26 (1986) (holding that the conduct of prison officials during the exigent circumstances of a prison riot was exempt from Eighth Amendment scrutiny); *Wilson v. Seiter*, 501 U.S. 294, 305-06 (1991) (requiring a prisoner to establish a prison official’s culpable state of mind as an element of a deliberate indifference claim under the Eighth Amendment).

and unnecessary pain" standard and the "deliberate indifference" standard. In *Rhodes v. Chapman*,⁶¹ the Court held that housing two prisoners in a single cell does not constitute a wanton or unnecessary infliction of pain.⁶² The Court recognized that double celling might cause pain, but held that the pain was not severe enough to be wanton or unnecessary.⁶³ In *Whitley v. Albers*,⁶⁴ the Court ruled that a prison riot situation created an exception to the "deliberate indifference" standard.⁶⁵ The Court, however, did recognize that the "deliberate indifference" standard protects against prison officials' use of excessive force.⁶⁶ The Court, nevertheless, rejected the petitioner's claim under both the "deliberate indifference"⁶⁷ standard and the "wanton and unnecessary" standard.⁶⁸ The Court emphasized that the actions prison officials took during a prison riot merited greater deference in light of the exigent nature of the circumstances.⁶⁹

61. 452 U.S. 337 (1981).

62. *Id.* at 348. Justice Marshall, in his dissenting opinion, however, cautioned that *Trop* mandated Eighth Amendment scrutiny of prison conditions. *Id.* at 372.

63. *Id.* at 348.

64. 475 U.S. 312 (1986). In *Whitley*, the petitioner had been shot in the leg by a prison official during a prison riot. *Id.* at 316. Petitioner alleged that his shooting constituted deliberate indifference on the part of prison officials to his welfare in violation of the Eighth Amendment. *Id.* at 317.

65. *Id.* at 320. The Court in *Whitley* held that "a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Id.*

66. *Id.* at 327. The Court reasoned that "the Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners in cases such as this one, where the deliberate use of force is challenged as excessive and unjustified." *Id.*

67. *Id.* at 326.

68. *Id.* at 319. The Court drew a crucial distinction between "obduracy and wantonness," which may be challenged under the Eighth Amendment and "inadvertence or error in good faith," which may not. *Id.* "[T]he 'unnecessary and wanton' standard . . . establishes a high hurdle to be overcome by a prisoner seeking relief for a constitutional violation." *Id.* at 329 (Marshall, J., dissenting).

69. *Id.* at 321-22. Justice O'Connor stated that:

[w]hen the 'ever-present potential for violent confrontation and conflagration,' *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 132 (1977), ripens into actual unrest and conflict, the admonition that 'a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators,' *Rhodes v. Chapman*, [452 U.S. 337] at 349, n.14, [1981] carries special weight. . . . That deference extends to a prison security measure taken in response to an actual confrontation with riotous inmates, just as it does to prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline. It does not insulate from review actions taken in bad faith and for no legitimate purpose, but it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice.

The Court clarified the meaning of the "deliberate indifference" standard first announced in *Estelle v. Gamble*,⁷⁰ in two decisions: *Wilson v. Seiter*⁷¹ and *Farmer v. Brennan*.⁷² In *Wilson*, the Court ruled that, to establish the "deliberate indifference" of a prison official, a petitioning prisoner must show that the official had a culpable state of mind.⁷³ Justice Scalia, writing for the majority, divided the "deliberate indifference" inquiry into a two-step test,⁷⁴ whereby the petitioner must satisfy both an objective and a subjective standard.⁷⁵ The objective test asks whether the punishment at issue is "sufficiently serious" to fall under the purview of the Eighth Amendment.⁷⁶ The subjective test seeks to establish whether the prison official had a culpable state of mind when imposing punishment or establishing the prison conditions.⁷⁷

Justice Scalia rejected the respondent prison officials' argument that the Court generally should apply the "malicious-and-sadistic" standard to prison condition cases, reserving the more lenient "deliberate indifference" standard for those cases where the prisoner suffered a physical injury.⁷⁸ Instead, Justice Scalia reasoned that any aspect of prison life that is a "condition of confinement" could meet the requirements of the objective prong.⁷⁹ The Supreme Court remanded the case because the trial

Id.

70. 429 U.S. 97 (1976); see also Stollman, *supra* note 51, at 1881 (describing the Court's expansion of the "deliberate indifference" standard, from *Estelle* to *Wilson*).

71. 501 U.S. 294 (1991).

72. 114 S. Ct. 1970 (1994).

73. *Wilson*, 501 U.S. at 300-01. In *Wilson*, an inmate at an Ohio state prison sued the prison warden, alleging that conditions at the prison violated the Eighth Amendment. *Id.* at 296. Specifically, the petitioner alleged "overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates." *Id.*

74. *Id.* at 298, 300-01.

75. *Id.* at 298, 300.

76. *Id.* at 298. Justice Scalia explained that the petitioner satisfies the objective component if he proves that the punishment deprived him of "the minimal civilized measure of life's necessities." *Id.* (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

77. *Id.*

78. *Id.* at 303-05. Justice Scalia argued that the "wantonness" of conduct depends on the constraints facing the prison official, not the effect on the prisoner. *Id.* Under the Scalia scheme, the objective prong inquires into the prisoner's injury, while the subjective prong goes to the circumstances under which the prison official acted. *Id.*

79. *Id.* at 303. Justice Scalia reasoned that "we see no significant distinction between claims alleging inadequate medical care and those alleging inadequate 'conditions of confinement.'" *Id.* Justice Scalia quoted Justice Powell's definition of the scope of the deliberate indifference inquiry: "[w]hether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard." *Id.* (citing *LaFaut v. Smith*, 834 F.2d 389, 391-92 (4th Cir. 1987)).

court had applied a "malicious-and-sadistic" standard rather than the "deliberate indifference" standard.⁸⁰

Following *Wilson*, the Supreme Court applied the two-step test to reduce the petitioner's burden under the objective prong, while increasing the petitioner's burden under the subjective prong.⁸¹ With regard to the objective prong, *Wilson* failed to clarify the threshold level at which a prisoner's injury would be sufficiently serious to trigger an Eighth Amendment violation.⁸² In *Hudson v. McMillian*,⁸³ however, the Supreme Court rejected the United States Court of Appeals for the Fifth Circuit's recently developed significant injury requirement.⁸⁴ The Court adjusted the subjective prong to require that the petitioner establish the culpability of prison officials under a "malicious-and-sadistic" standard.⁸⁵ In *Hudson*, prison officials assaulted a prisoner who suffered minor injuries.⁸⁶ The Court, in Justice O'Connor's majority opinion, ruled that,

80. *Id.* at 305-06. Justice White, in a concurring opinion, criticized the majority for the heavy burden of proof that the subjective prong places on the petitioning prisoner. *Id.* at 309. Justice White argued that the petitioner should not be required to establish the culpable state of mind of the prison official. *Id.* Justice White argued that this intent requirement might apply to excessive force cases, but should not extend to cases concerning prison conditions, because inhumane conditions could result from "cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time." *Id.* at 310. As a result, a prisoner would likely find it impossible to satisfy the intent requirement. *Id.*

81. See *Hudson v. McMillian*, 503 U.S. 1, 6-9 (1992) (rejecting the requirement that the prisoner prove that he suffered a significant injury under the objective element, but insisting that the prisoner prove that officials acted in a malicious and sadistic manner under the subjective element).

82. See *Wilson*, 501 U.S. at 298. *Wilson* did not address in detail the requirement of the objective element of the test; the Court merely stated that the deprivation must be "sufficiently serious." *Id.*

83. 503 U.S. 1 (1992).

84. *Id.* at 8. The significant injury requirement was developed in *Johnson v. Morel*, 876 F.2d 477, 479 (5th Cir. 1989), and relied upon in *Huguet v. Barnett*, 900 F.2d 838, 841 (5th Cir. 1990) (tracing the origins of the significant injury requirement under the Eighth Amendment to Fourth Amendment jurisprudence). Justice O'Connor, in her majority opinion in *Hudson*, used the *Trop* standard to reject the serious injury requirement. *Hudson*, 503 U.S. at 8. Justice O'Connor reasoned that if prison officials' actions offend contemporary standards of decency under a *Trop* analysis, then the Eighth Amendment is violated "whether or not significant injury is evident." *Id.* at 9.

85. *Hudson*, 503 U.S. at 6-7. This reversal on the subjective prong represented a rejection of the culpable state of mind approach adopted in *Wilson*, 501 U.S. at 299, in favor of the more onerous "malicious-and-sadistic" standard previously adopted in *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986).

86. *Hudson*, 503 U.S. at 4. In *Hudson*, petitioner Keith Hudson, an inmate at a Louisiana state penitentiary became embroiled in an argument with respondent McMillian, a corrections security officer, and two of his colleagues. *Id.* Petitioner was handcuffed, shackled, and led from his cell toward the "administrative lockdown" area. *Id.* Petitioner alleged that on the way to the lockdown area, respondent kicked and punched him in the mouth, eyes, chest, and stomach. *Id.* Petitioner also alleged that the supervisor on duty at

even though the prisoner did not suffer serious injury, the use of excessive physical force against him might constitute cruel and unusual punishment.⁸⁷

Hudson placed critical emphasis on the subjective question of whether the prison official had a malicious and sadistic intent.⁸⁸ The Court stipulated that the "malicious-and-sadistic" standard must be applied to *all* excessive force cases.⁸⁹ This approach undermines the view that the Court expressed in *Whitley* that greater deference is due to prison officials acting under the exigent circumstance of a riot situation.⁹⁰

In *Farmer v. Brennan*,⁹¹ the Court rejected the "malicious-and-sadistic" standard and reverted to the "deliberate indifference" standard to determine whether a prison official's action, or failure to act, might violate a prisoner's Eighth Amendment rights.⁹² In *Farmer*, the petitioner, a pre-operative transsexual who "projects feminine characteristics,"⁹³ was

the time observed the beating and told respondent McMillian "not to have too much fun." *Id.*

87. *Id.* at 6-7; see Diana L. Nelson, Note, *Hudson v. McMillian: The Evolving Standard of Eighth Amendment Application to the Use of Excessive Force Against Prison Inmates*, 71 N.C. L. REV. 1814, 1836 (1993) (arguing that the Court's rejection of a serious injury requirement alleviated the burden of establishing the prison official's mens rea).

88. *Hudson*, 503 U.S. at 7. Justice O'Connor's majority opinion described this inquiry as "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Id.*

89. *Id.* Justice Stevens and Justice Blackmun, concurring, disagreed with the application of the malicious-and-sadistic standard to all excessive force cases. *Id.* at 12-13, 14. One law review article argued that the Court erred in applying the "malicious-and-sadistic" standard to all excessive force cases. Jennifer Buehler, Note, *Hudson v. McMillian: Rejecting The Serious Injury Requirement, But Embracing The Malicious-And-Sadistic Standard*, 42 CATH. U. L. REV. 683, 710-13 (1993). The "malicious-and-sadistic" standard emerged from *Whitley v. Albers*, which concerned a prison riot situation. 475 U.S. 312, 327-28 (1986). *Hudson*, which concerned non-riot prison conditions, is thus entirely distinguishable from *Whitley*. See *Hudson*, 503 U.S. at 4 (involving a prisoner's allegation that he was beaten by prison officials after an argument with a prison guard). *Contra Whitley*, 475 U.S. at 327-28 (involving a prisoner's allegation that he was shot in the leg by a prison official during a prison riot).

90. *Whitley*, 475 U.S. at 321-22.

91. 114 S. Ct. 1970 (1994).

92. *Id.* at 1974.

93. *Id.* at 1975. In what the LEGAL TIMES described as "one of the more interesting rhetorical oddities from last term," the Supreme Court effected a compromise on the issue of whether the petitioner, Dee Farmer, should be referenced by the male or female pronoun. Tony Mauro, *Politics of Pronouns*, LEGAL TIMES, Aug. 15, 1994, at 2. Counsel for the petitioner, in compliance with their client's wishes, used the female pronoun. Brief for Petitioner at 2 n.2, *Farmer v. Brennan*, 114 S. Ct. 1970 (1994) (No. 92-7247). The government, arguing that petitioner was a biological male, opted for the male pronoun. Brief for Respondent at 2 n.3, *Farmer v. Brennan*, 114 S. Ct. 1970 (1994) (No. 92-7247). The Court trod a diplomatic course by avoiding any gender-specific reference. It referred either to "Dee Farmer" or to "petitioner." *Farmer*, 114 S. Ct. at 1974.

transferred from a federal correctional institute to a penitentiary where a fellow inmate allegedly assaulted and raped her.⁹⁴ Petitioner's theory was that prison officials knew she would be assaulted at the penitentiary, and that, therefore, they acted with deliberate indifference to her welfare, thereby violating her Eighth Amendment rights.⁹⁵

Justice Souter's majority opinion refined the two-prong test for deliberate indifference established in *Wilson*.⁹⁶ Under the *Farmer* test, the petitioner first must prove objectively that the deprivation suffered was "sufficiently serious."⁹⁷ Second, the petitioner must show that the official disregarded a risk of harm to the prisoner of which the official was aware.⁹⁸ The second prong requires a showing of subjective recklessness, which the Court deemed analogous to the criminal law recklessness standard.⁹⁹ The *Farmer* Court emphasized that the Eighth Amendment is a prohibition on "cruel and unusual punishments" rather than a prohibition

94. *Farmer*, 114 S. Ct. at 1975. Petitioner Farmer alleged that, within two weeks of her arrival at the penitentiary, she was beaten and raped in her cell by a fellow inmate. *Id.* at 1975; see also *Panel Discussion: Men, Women and Rape*, 63 *FORDHAM L. REV.* 125, 127 n.10, 128 n.11 (1994) (providing a catalog of legal, psychological and sociological sources that discuss the phenomenon of homosexual rape in the penal system); *The Supreme Court, 1993 Term: Leading Cases*, 108 *HARV. L. REV.* 139, 237 n.52 (1994) (explaining the prejudices that victims of homosexual rape must confront in bringing a claim); Kathleen Knepper, *Responsibility of Correctional Officials in Responding to the Incidence of the HIV Virus in Jails and Prisons*, 21 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 45 (1995) (documenting the problems of dealing with prisoners infected with the HIV virus).

95. *Farmer*, 114 S. Ct. at 1975. Petitioner Farmer, acting initially without counsel, filed a complaint alleging that respondent prison officials placed her in the penitentiary population knowing that, as a transsexual, she inevitably would be targeted for sexual attack at an institution with a history of violence and inmate assaults. *Id.* This, petitioner alleged, constituted deliberate indifference in violation of the Eighth Amendment. *Id.*

96. *Id.* at 1977-78 (explaining that the Court had not previously "paused to explain the meaning of the term 'deliberate indifference'"). The parties agreed that the deliberate indifference standard applied, but disagreed as to its meaning. *Id.* at 1977.

97. *Id.* (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). The Court explained that, for a claim such as petitioner Farmer's to prevail "based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm." *Id.*

98. *Id.* at 1977-78. This "actual knowledge requirement" has been criticized for effectively eliminating the use of a deliberate indifference claim to provide injunctive or pre-attack relief. See *Leading Cases*, *supra* note 94, at 238. The Harvard survey argues that Justice Souter's opinion assumes that a prisoner will discern an impending attack and then be willing to inform the prison guards. *Id.* Yet, new prisoners in particular may be unaware of the imminence of attack and, even if they become aware, they may be reluctant to "snitch" to the prison guards and face retribution from other prisoners. *Id.* at 238 & nn.54, 55 (citing a number of sources that discuss rape in prison culture). An experienced prison guard will, ironically, be in a better position than a neophyte prisoner to identify an imminent attack. *Id.* at 238 n.54.

99. *Farmer*, 114 S. Ct. at 1978-79. *Farmer* may have clarified the *Wilson* two-step, objective/subjective test, but this hardly satisfied critics who believe that a subjective component is unduly onerous on prisoners and eviscerates their prospects of a successful claim.

on conditions.¹⁰⁰

Justice Thomas concurred, stating that the Eighth Amendment is not applicable to prison condition cases at all.¹⁰¹ Justice Blackmun, concurring, rejected the view that prison conditions are beyond the scope of the Eighth Amendment.¹⁰² He asserted that the Eighth Amendment focuses on physical, as well as psychological, punishment and, therefore, he characterized the assault on Farmer as torture.¹⁰³ Justice Blackmun's opinion bears a clear theme: an interpretation of the Eighth Amendment that restricts its scope merely to punishment and not to treatment of individuals neither reflects the intent of the Framers nor the standards of decency in a modern, civilized society.¹⁰⁴

Despite strong differences of opinion, the entire Court concurred in the *Farmer* ruling.¹⁰⁵ The "deliberate indifference" standard won Justice Blackmun's nominal support because it holds prison officials, at least theoretically, liable for injuries such as Farmer's.¹⁰⁶ But this standard requires that the complaining prisoner prove that the prison official's subjective behavior constituted deliberate indifference, analogous to criminal recklessness, toward the prisoner's welfare.¹⁰⁷ Ironically, some

See, e.g., Kritchevsky, *supra* note 49, at 459-62 (arguing that liability should be judged by objective, rather than subjective, criteria).

The annual *Harvard Law Review* survey of the Supreme Court's 1993 Term challenged the *Farmer* Court's conclusion that *Wilson* mandated a subjective prong. *Leading Cases*, *supra* note 94, at 239. The Harvard survey argued that *Wilson* did not define deliberate indifference, thus leaving the *Farmer* Court free to develop a purely objective test for establishing an official's culpable state of mind. *Id.* (postulating that "[g]iven *Wilson*'s silence on this issue, the *Farmer* Court was hardly bound to adopt an unjust and unworkable subjective standard"). The Harvard survey also noted with disapproval that *Farmer* maintained the *Wilson* requirement that the petitioning prisoner must identify at least one prison official exhibiting deliberate indifference toward his welfare. *Id.* at 238-39. This requirement, the Harvard survey argued, places a further burden on the prisoner. *Id.*

100. *Farmer*, 114 S. Ct. at 1799. The Court cautioned that although action or inaction by a prison official without a significant risk of harm may not be cause for commendation, it would not constitute the infliction of punishment either. *Id.*

101. *Id.* at 1800 (Thomas, J., concurring). Justice Thomas rationalized his particularly narrow interpretation by stating that "judges or juries—but not jailers—impose 'punishment.'" *Id.* (citing his own opinions in *Helling v. McKinney*, 113 S. Ct. 2475, 2484 (1993) and *Hudson v. McMillian*, 503 U.S. 1, 18 (1992)).

102. *Id.* at 1806 (Blackmun, J., concurring).

103. *Id.* at 1807.

104. *Id.* at 1809.

105. *Id.* at 1804.

106. *Id.* at 1806. Justice Blackmun concurred because the Court's decision "creates no new obstacles for prison inmates to overcome," and because he believed that *Farmer* would impose an affirmative duty on prison officials concerning prisoner welfare. *Id.*

107. *Id.* at 1808-09. The Court also recognized that administrative officials may be excused of liability on the basis of having acted, however mistakenly, in good faith. See *United States v. Leon*, 468 U.S. 897 (1984) (recognizing the validity of a search warrant

hailed the *Farmer* decision as offering a breakthrough remedy for prisoners.¹⁰⁸ This remedy, however, may not present "any realistic opportunity to prevent or redress violations of [prisoners'] Eighth Amendment rights."¹⁰⁹

b. Death Penalty Cases

In the early 1970s, the Supreme Court, in *Furman v. Georgia*,¹¹⁰ de-

issued on the basis of inaccurate information that a police officer proffered in the good faith belief that it was correct; this is the so-called "good faith" exception under the Fourth Amendment). The *Farmer* Court emphasized its concern to establish "a standard that incorporates due regard for prison officials' 'unenviable task of keeping dangerous men in safe custody under humane conditions.'" *Farmer*, 114 S. Ct. at 1983 (quoting *Spain v. Procunier*, 600 F.2d 189, 193 (9th Cir. 1979)). *But see* Kritchevsky, *supra* note 49, at 459-62 (arguing that liability should be judged by objective, rather than subjective, criteria).

108. *See, e.g.*, David G. Savage, *High Court Opens Door to Rape Suits by Inmates*, L.A. TIMES, June 7, 1994, at A4. Advocates for petitioner Farmer's position struggled to interpret the Court's decision as a victory. Jeffrey T. Renz, director of the Montana Defender Project, who filed an amicus brief in support of Dee Farmer, claimed that the Court clarified a "previously 'mushy,' fact-bound standard." Marcia Coyle, *High Court Roundup: Counsel, Jails, Taxes*, NAT'L L.J., June 20, 1994, at A11. Alvin J. Bronstein of the American Civil Liberties Union, who represented Dee Farmer, stated that *Farmer* could enable more prisoners to at least get their grievances to trial. Joan Biskupic, *Justices Reinstate Lawsuit Filed by Raped Prisoner: Officials Held Liable Only If They Know of Risk*, WASH. POST, June 7, 1994, at A6.

109. *Leading Cases*, *supra* note 94, at 240. The annual *Harvard Law Review* survey of the Supreme Court's 1993 Term was scathing in its criticism of *Farmer*. *Id.* at 231-40. The survey argued that "*Farmer v. Brennan* effectively leaves inhumane prison conditions without constitutional remedy." *Id.* at 235.

If the deliberate indifference burden of proof is not onerous enough, petitioning prisoners' claims may fall victim to the prejudices of juries. Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447, 454 (1978) (arguing that prisoners must overcome the additional hurdle of appearing inherently less sympathetic than prison officials to a jury). Newman describes this contrast in stark terms: "[a]t the defendants' table sit the police officers . . . with the American flag figuratively wrapped around them . . . [while] the section 1983 plaintiff is likely to be black or Puerto Rican, poor, disheveled, a felon, and often a drug addict." *Id.* The *Harvard Law Review* survey added that the transsexuality of a petitioner such as Dee Farmer probably would not attract the jury's sympathy. *Leading Cases*, *supra* note 94, at 237 n.50.

110. 408 U.S. 238 (1972) (per curiam). *Furman* was a 5-4 decision, with Justice Douglas, Justice Brennan, Justice Stewart, Justice White, and Justice Marshall in the majority and Chief Justice Burger, Justice Blackmun, Justice Powell, and Justice Rehnquist in the minority. *Id.* at 240. The majority, that prevailed by the narrowest of margins, itself was deeply divided. Each of the five majority justices wrote a separate opinion. *Id.* Similarly, each of the four dissenting justices submitted a separate opinion. *Id.* The result is the longest decision in the history of the Supreme Court. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 220 (1979) (documenting the internal machinations of the deliberative and decision-making processes of the Burger Court).

Justice Douglas' concurrence relied on the rationale of *In re Kemmler*, that the Cruel and Unusual Punishments Clause is a prohibition against "inhuman and barbarous" pun-

clared a state death penalty statute unconstitutional under the Eighth Amendment.¹¹¹ Scholars and commentators describe *Furman* as a “wa-

ishments. *Furman*, 408 U.S. at 241 (Douglas, J., concurring) (citing *In re Kemmler*, 136 U.S. 436, 447 (1890)). Justice Brennan’s concurring opinion argued that the death penalty was not only unusual but unique by virtue of its “extreme severity.” *Id.* at 287 (Brennan, J., concurring). Justice Stewart’s concurring opinion cited the “total irrevocability” of the death penalty. *Id.* at 306 (Stewart, J., concurring). Justice White, like Justice Brennan, questioned whether the death penalty might be unusual due solely to the infrequency of its application. *Id.* at 310-11 (White, J., concurring).

Two commentators, Nakell and Hardy, summarized the differing positions of the majority justices as follows:

Justices Brennan and Marshall decided that the death penalty was an unconstitutional form of punishment. Justices Douglas, Stewart, and White confined their decisions to the death penalty as they perceived it was applied. The Court and the conventional wisdom have considered their opinions the law of *Furman* in some collective sense, often focusing primarily on Justice Stewart’s opinion. The theme common to all five opinions for the majority justices was an arbitrariness rationale. Justice Stewart relied almost completely on that theory. Justice White relied on arbitrariness and on a related infrequency theory. Justice Brennan considered the arbitrariness rationale one of four principles by which he determined that the death penalty is unconstitutional. Justice Douglas concentrated on the discrimination component of arbitrariness. Justice Marshall considered the discrimination theory as one reason the death penalty was morally unacceptable in the sense that it “shocks the conscience and sense of justice of the people.”

BARRY NAKELL & KENNETH A. HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* 22 (1987) (quoting *Furman*, 408 U.S. at 360, quoting *United States v. Rosenberg*, 195 F.2d 583, 608 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952)).

This Comment does not attempt to summarize the separate views of the nine justices. For a more detailed discussion of *Furman* decision, see *THE DEATH PENALTY IN AMERICA* 247-70 (Hugo Adam Bedau ed., 3d ed. 1982) (documenting each of the *Furman* opinions); see also JAN GORECKI, *CAPITAL PUNISHMENT: CRIMINAL LAW AND SOCIAL EVOLUTION* 5-13 (1983) (discussing the separate views of the justices); NAKELL & HARDY, *supra*, at 20-26 (summarizing each of the five majority opinions).

111. 408 U.S. at 239-40. In *Furman*, the Supreme Court held that the Georgia and Texas death penalty statutes violated the Cruel and Unusual Punishments Clause of the Eighth Amendment. *Id.* The *Furman* decision was announced on June 29, 1972 along with two related cases: *Jackson v. Georgia*, 171 S.E.2d 501 (Ga. 1969); and *Branch v. Texas*, 447 S.W.2d 932 (Tex. Crim. App. 1969). *Id.* Each of the three defendants had been sentenced to death; one for murder, and the other two for rape. *Id.* at 240 n.1 (Douglas, J., concurring).

The *Furman* decision prompted speculation that the Court might soon declare the death penalty *per se* unconstitutional under the Eighth Amendment. See, e.g., Daniel D. Polsby, *The Death of Capital Punishment?* *Furman v. Georgia*, 1972 SUP. CT. REV. 1, 40 (Philip B. Kurland ed., 1973) (criticizing the failure of the majority in *Furman* to produce a cohesive, unified rationale for the Court’s decision, and predicting that the “five separate opinions with none commanding the concurrence of any Justice other than its author” could “make this judgment of dubious value as a precedent”). Polsby, an opponent of the death penalty, *id.* at 3, nevertheless criticized *Furman*, stating that “in terms of reasoned judgments, the majority justices in *Furman* did not have one of their finest hours.” *Id.* at 40. As other commentators noted, “[t]hough many hailed the Supreme Court’s decision in *Furman* as the final renunciation of the death penalty, a close examination of the decision reveals a

tershed" or "landmark" decision.¹¹² Among the five justices voting with the majority, the opinions of Justice Marshall and Justice Brennan provided the most expansive interpretation of Eighth Amendment rights.¹¹³

Justice Marshall offered a general Eighth Amendment framework that provided four reasons for finding a punishment cruel and unusual.¹¹⁴ This framework closely resembled four principles that Justice Brennan presented in his concurring opinion.¹¹⁵ First, Justice Marshall noted that cruel punishments violate the Eighth Amendment.¹¹⁶ Second, he empha-

much less certain result." FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 51 (1986).

Jan Gorecki evaluated *Furman* by explaining that:

Furman will stand in American legal history as one of the most peculiar decisions for both what it did and what it refrained from doing. It did not resolve the basic problem of validity of capital punishment; the issue was, in 1972, too dubious and controversial. Instead, by answering a narrower question, it banned the death penalty as applied in the cases at hand.

GORECKI, *supra* note 110, at 10.

112. BEDAU, *supra* note 110, at 248; Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1940 n.10 (1988); Joseph L. Hoffmann, *Is Innocence Sufficient? An Essay on the U.S. Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty*, 68 IND. L.J. 817, 820 (1993); Sandra D. Jordan, *Death For Drug Related Killings: Revival of the Federal Death Penalty*, 67 CHI.-KENT L. REV. 79, 83 (1991); *The Supreme Court, 1983 Term: Leading Cases*, 98 HARV. L. REV. 87, 97 (1984). Justice Brennan, an author of one of the five majority opinions in *Furman*, shared this view. William J. Brennan, Jr., *The 1986 Oliver Wendell Holmes, Jr. Lecture: Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 314 (1986) (describing *Furman* as one of the "landmark cases").

113. *Furman*, 408 U.S. at 257-306 (Brennan, J., concurring), 314-74 (Marshall, J., concurring). Justice Marshall traced the development of the scope of the Supreme Court's interpretation of the phrase, "cruel and unusual punishments," from *Wilkerson v. Utah*, 99 U.S. 130 (1879), *In re Kemmler*, 136 U.S. 436 (1890), *Weems v. United States*, 217 U.S. 349 (1910), through *Trop v. Dulles*, 356 U.S. 86 (1958). *Id.* at 322-45 (Marshall, J., concurring). Justice Brennan also traced the expansion of the Supreme Court's interpretation of the Cruel and Unusual Punishments Clause through the same line of cases cited in Justice Marshall's opinion. *Id.* at 257-306 (Brennan, J., concurring).

114. *Id.* at 330-33 (Marshall, J., concurring). Justice Marshall conceded that, "[t]o arrive at the conclusion that the death penalty violates the Eighth Amendment, we have had to engage in a long and tedious journey." *Id.* at 370.

115. *Id.* at 270-80 (Brennan, J., concurring). Justice Brennan reasoned that there are four constitutional principles that apply to death penalty jurisprudence. *Id.* Justice Brennan's first principle limits the severity of punishment in order to prevent the degradation of human dignity. *Id.* at 271. The second principle prohibits the arbitrary infliction of severe punishment. *Id.* at 274. The third principle cautions that a severe punishment must not offend the standards of contemporary society. *Id.* at 277. Finally, the fourth principle declares that severe punishments may not be excessive. *Id.* at 279.

116. *Id.* at 330 (Marshall, J., concurring). Justice Marshall stated that "there are certain punishments that inherently involve so much physical pain and suffering that civilized people cannot tolerate them." *Id.*

sized that unusual punishments are unconstitutional.¹¹⁷ Third, Justice Marshall stated that excessive punishments violate the proportionality doctrine.¹¹⁸ Fourth, Justice Marshall argued that, even if a punishment does not violate the third test, it still might violate the Eighth Amendment under a test resembling the *Trop* standard.¹¹⁹ Justice Marshall used a historical analysis of the Framers' intent and of the development of Eighth Amendment jurisprudence to argue that the death penalty violated the first two tests.¹²⁰ Justice Marshall then used data on the application of the death penalty to conclude that it failed the third and fourth tests.¹²¹

The *Furman* decision arguably represents the high-water mark in the progressive development of Eighth Amendment jurisprudence.¹²² Four years later, in *Gregg v. Georgia*,¹²³ the Court upheld death penalty statutes drafted specifically to alleviate some of the *Furman* Court's concerns.¹²⁴ The *Gregg* decision reflected a greater concern for judicial

117. *Id.* at 331. Justice Marshall defined unusual punishments as those "previously unknown as penalties for a given offense." *Id.*

118. *Id.* at 331-32. Justice Marshall explained that "a penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose." *Id.* at 331.

119. *Id.* at 332-33. Justice Marshall stated that "where a punishment is not excessive and serves a valid legislative purpose, it still may be invalid if popular sentiment abhors it." *Id.*; cf. *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (interpreting the Eighth Amendment by reference to "evolving standards of decency"). Justice Marshall argued that "there are principles recognized in our cases and inherent in the Clause sufficient to permit a judicial determination whether a challenged punishment comports with human dignity." *Furman*, 408 U.S. at 270 (Marshall, J., concurring).

120. *Furman*, 408 U.S. at 314-60 (Marshall, J., concurring) (arguing that the Framers intended to prohibit the death penalty by the language of the Cruel and Unusual Punishments Clause).

121. *Id.* at 371-74 (using statistical data to demonstrate a trend among the states towards abolishing the death penalty and reducing its application in those states retaining death penalty statutes).

122. *See id.*

123. 428 U.S. 153 (1976). Justice Stewart announced the opinion of the Court, in which Justice Powell and Justice Stevens concurred. *Id.* at 158. Justice White wrote a concurring opinion joined by Chief Justice Burger and Justice Rehnquist. *Id.* at 207. Justice Blackmun filed a separate concurring opinion. *Id.* at 227. Justice Brennan and Justice Marshall filed dissenting opinions. *Id.* at 227, 231. Like the *Furman* majority, the *Gregg* majority was criticized for failing to coalesce behind a single, unified approach. *See* Hans Zeisel, *The Deterrent Effect of the Death Penalty: Facts v. Faiths*, 1976 SUP. CT. REV. 317 (Philip B. Kurland ed., 1977) (noting that "[o]nce again in the 1975 Term, the Justices of the Supreme Court found themselves unable to express a unified position on the validity of the death penalty"). Zeisel cited a number of statistical studies as evidence that "the deterrent effect [of the death penalty], if it exists at all, can be only minute." *Id.* at 342.

124. 428 U.S. at 206-07 (upholding the Georgia death penalty statute that had been drafted in response to *Furman*). Justice Stewart's plurality opinion stated that "the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the

deference to state legislatures than the Court displayed in *Furman*.¹²⁵

Despite its concessions to state death penalty statutes in *Gregg*, the Supreme Court continued placing restrictions on the application of such statutes.¹²⁶ The Court rejected statutes requiring death sentences for particular crimes as violating the Cruel and Unusual Punishments Clause.¹²⁷ In *Woodson v. North Carolina*,¹²⁸ the Court ruled that statutorily mandated death sentences violate the Eighth Amendment.¹²⁹ In *Woodson*, the defendants were convicted of first-degree murder and sentenced to death pursuant to a North Carolina statute mandating the death penalty for such an offense.¹³⁰ Justice Stewart's majority opinion specified that the key indicators of the *Trop* standard of "evolving standards of decency that mark the progress of a maturing society"¹³¹ were history, legislative enactments, and jury determinations.¹³² Justice Stewart, however, explained that automatic death sentences deny juries the opportunity to

procedure followed in reaching the decision to impose it." *Id.* at 187. Justice Stewart continued that "the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." *Id.* at 195.

125. See *id.* at 174-75. The concurring opinions of Justices Douglas, Brennan, and Marshall in *Furman* all relied on statistical and social science data concerning the death penalty. *Furman*, 408 U.S. at 249-50 (Douglas, J., concurring) (using statistical data to show that the death penalty has been applied on a racially discriminatory basis); *id.* at 291-94 & nn.40-46 (Brennan, J., concurring) (using statistical data to show that the application of the death penalty has declined steadily since the 1930s); *id.* at 373-74 (Marshall, J., concurring) (using statistical data to show a trend among the states toward abolition of the death penalty, both on a statutory basis and in terms of a reluctance to impose capital punishment even when the sanction remains available).

But the *Gregg* Court's restraint was a recognition that state legislatures considered the *Furman* criticisms of the death penalty and passed death penalty statutes with built-in safeguards in response to those criticisms. *Gregg*, 428 U.S. at 162-63. The presence of new safeguards addressed the first three of Justice Marshall's objections in *Furman*, while the legislative endorsement of the new death penalty statutes, as a reflection of "popular enthusiasm," mitigated concerns under Justice Marshall's fourth test. See David O. Stewart, *Dealing With Death*, A.B.A. J., Nov. 1994, at 50.

126. See *Coker v. Georgia*, 433 U.S. 584, 592 (1977). In *Coker*, the Court held that the imposition of the death penalty for the crime of raping an adult woman would violate the Eighth Amendment on proportionality grounds. *Id.*; see also *Enmund v. Florida*, 458 U.S. 782, 788 (1982) (invalidating the imposition of the death penalty on a defendant who was convicted of felony-murder but did not commit the actual murder).

127. See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (invalidating the mandatory imposition of the death penalty by statute for defendants convicted of specified crimes).

128. 428 U.S. 280 (1976).

129. *Id.* at 305. The Court, citing *Gregg*, declined the petitioner's invitation to revert to the *Furman* approach, which held that the death penalty is *per se* cruel and unusual punishment. *Id.* at 285.

130. *Id.* at 284.

131. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

132. *Woodson*, 428 U.S. at 288.

consider the particular circumstances of an individual defendant's case.¹³³

The Supreme Court reaffirmed its opposition to automatic death sentences in *Enmund v. Florida*.¹³⁴ In *Enmund*, the Court specifically recognized the influence of "international opinion."¹³⁵ The Court held that the Eighth Amendment does not permit the imposition of the death penalty on a defendant who aids or abets the commission of a felony where one of the other participants commits murder.¹³⁶ In *Enmund*, the defendant served as the getaway driver in a conspiracy to rob an elderly couple.¹³⁷ One of Enmund's co-conspirators shot and killed the couple in the course of the robbery.¹³⁸ Enmund was convicted on the basis of aiding and abetting in the commission of the crime, but he did not kill, attempt to kill, or use lethal force.¹³⁹ Relying on "international opinion" to guide its determination, the Court noted that the felony-murder doctrine has been abolished in England and India, restricted in Canada, and has

133. *Id.* at 295. Justice Stewart argued that juries share with society at large an aversion to the death penalty. *Id.* at 295.

134. 458 U.S. 782 (1982).

135. *Id.* at 788. The *Enmund* Court cited *Coker v. Georgia*'s reliance on, "the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made" as factors to be weighed prior to the Court exercising its own judgment. *Id.* at 788-89 (citing *Coker v. Georgia*, 433 U.S. 584, 593 (1977)). Justice Brennan, concurring, reiterated his personal view that the death penalty is prohibited by the Eighth Amendment in all circumstances. *Id.* at 801 (Brennan, J., concurring).

Justice O'Connor, dissenting, argued that the death penalty for felony-murder was "not disproportionate to the crime." *Id.* at 827 (O'Connor, J., dissenting). Justice O'Connor's dissent, which was joined by Chief Justice Burger and Justices Powell and Rehnquist, followed the *Woodson* rationale against automatic death sentences. *Id.* *Woodson* emphasized the need for courts to make an individualized judgment concerning the defendant's *mens rea* prior to imposing a death sentence. *Woodson*, 428 U.S. at 293. Justice O'Connor favored remanding the case for a new sentencing hearing on grounds that the Florida Supreme Court failed to consider mitigating evidence that Enmund's role in the murders was relatively minor. *Enmund*, 458 U.S. at 827.

136. *Enmund*, 458 U.S. at 783-84. The Court found that Enmund lacked an intent to kill and concluded that "death is an unconstitutional penalty absent an intent to kill." *Id.* at 796.

137. *Id.* at 784.

138. *Id.* The Court reasoned that the death penalty should not be imposed on a defendant such as Enmund, who lacked the requisite culpable mental state for murder. *Id.* at 796, 799. "[I]f a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious felony murder will not 'enter into the cold calculus that precedes the decision to act.'" *Id.* at 799 (quoting *Gregg v. Georgia*, 428 U.S. 153, 186 (1976)). Under such circumstances, the Court argued, the twin goals of the death penalty—retribution and deterrence—would not be served. *Id.* at 798.

139. *Id.* at 801. The Court reasoned that "[p]utting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts [sic]." *Id.*

never been applied in continental Europe.¹⁴⁰

But the *Enmund* decision was an aberration for a Supreme Court that, by 1982, was "going out of the business of telling the states how to administer the death penalty phase of capital murder trials."¹⁴¹ The Supreme Court's shift on the death penalty issue is epitomized by its handling of the issue of the capital punishment for juveniles. The Court addressed this issue, and reached opposite results, in two cases that were decided less than one year apart: *Thompson v. Oklahoma*¹⁴² and *Stanford v. Kentucky*.¹⁴³

140. *Id.* at 796 n.22.

141. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 305 (Philip B. Kurland ed., 1984). Weisberg cites four key death penalty cases where, on each occasion, the Court upheld the death sentences imposed. *Id.* at 305 n.1. The four cases are: *Barclay v. Florida*, 463 U.S. 939 (1983) (affirming the imposition of the death penalty under a Florida statute); *Barefoot v. Estelle*, 463 U.S. 880 (1983) (affirming the imposition of the death penalty under a Texas statute); *Zant v. Stephens*, 462 U.S. 862 (1983) (affirming the imposition of the death penalty under a Georgia statute); *California v. Ramos*, 463 U.S. 992 (1983) (affirming the imposition of the death penalty under a California statute).

142. 487 U.S. 815, 838 (1988) (holding that the Cruel and Unusual Punishments Clause prohibits the execution of a person who is under the age of sixteen years at the time of the offense).

Prior to discussing the *Thompson* and *Stanford* decisions, some background on the post-*Furman* case law on juvenile executions is appropriate. In *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), a plurality held that under the Eighth Amendment, a defendant generally may introduce mitigating evidence when confronted with a potential death sentence. *Id.* at 604 (Burger, C.J., plurality opinion). The Court's decision invalidated the Ohio death penalty statute, OHIO REV. CODE ANN. §§ 2929.03-.04 (Anderson 1975), which specifically prohibited the introduction of mitigating evidence, such as the age or character of the defendant. *Lockett*, 438 U.S. at 607-08. *Lockett* concerned a 21-year-old female defendant charged with the aggravated murder of a pawnbroker, who had been shot by one of the defendant's co-conspirators in the course of a robbery. *Id.* at 589-91. The defendant drove the getaway car. *Id.* at 590. The group of three co-conspirators included the defendant's brother. *Id.* at 590; see also *Bell v. Ohio*, 438 U.S. 637, 639 (1978) (reversing the conviction of a defendant who, when 16 years old, participated with an 18-year-old friend in the kidnapping and murder of a 64-year-old man).

Four years later, *Eddings v. Oklahoma* presented the Court with a slightly different situation. 455 U.S. 104 (1982). Like the defendant in *Bell*, the defendant in *Eddings* was 16 years old when he was alleged to have murdered a police officer. *Id.* at 105-06. Unlike the Ohio statute at issue in *Lockett* and *Bell*, the Oklahoma death penalty statute permitted the introduction of mitigating evidence. *Id.* at 106. While the judge considered evidence of the defendant's age at the sentencing hearing, the judge ruled that evidence of the defendant's "troubled youth" was not mitigating in nature. *Id.* at 107-09. The Supreme Court reversed and remanded the sentence on the ground that the "troubled youth" evidence was mitigating and should have been considered by the judge at the sentencing hearing. *Id.* at 113.

In *Lockett*, *Bell*, and *Eddings*, the Supreme Court did not directly consider the issue of the constitutionality of executing a juvenile. For further discussion of these cases, see Hoffmann, *supra* note 38, at 234-36.

143. 492 U.S. 361, 380 (1989) (holding that the imposition of capital punishment on an

In *Thompson*, the Court ruled that the Eighth Amendment prohibited imposing the death penalty on defendants under the age of sixteen at the time that they committed the crime.¹⁴⁴ Justice Stevens' plurality opinion specifically cited standards under international law, as well as the practices of other nations, to establish that an alternative ruling would violate modern standards of decency among civilized nations.¹⁴⁵ His opinion

individual for a crime committed at the ages of 16 or 17 years does not constitute cruel and unusual punishment under the Eighth Amendment).

144. *Thompson*, 487 U.S. at 838 (Stevens, J., plurality opinion). Petitioner, who was 15 years old at the time, participated with three older persons in the murder of his former brother-in-law. *Id.* at 819. The victim was shot twice, his throat, chest, and abdomen were cut, and his leg was broken. *Id.* His body was chained to a concrete block and thrown in a river. *Id.* Each of the four participants was tried separately, convicted of first-degree murder, and sentenced to death. *Id.*

Hoffmann explained how Oklahoma justified imposing the same sentence on the 15-year-old defendant as that meted out to his adult co-defendants:

Under Oklahoma law, fifteen year olds are treated as "children" subject to the juvenile courts rather than the adult criminal justice system, unless a specific finding is made to the contrary. In order to certify a fifteen year old to stand trial as an adult, the trial judge must find that (1) the state has established the "prosecutive merit" of the case, and (2) there are no reasonable prospects for rehabilitation of the "child" within the juvenile justice system. After hearing testimony from a clinical psychologist, a juvenile justice system employee, and other witnesses familiar with Thompson's background, the trial judge entered an order certifying Thompson to be tried as an adult.

Hoffmann, *supra* note 38, at 237 (footnotes omitted).

145. *Thompson*, 487 U.S. at 830-31 (Stevens, J., plurality opinion). Justice Stevens was joined by Justices Blackmun, Brennan, and Marshall. *Id.* at 818. Justice O'Connor concurred in the judgment but wrote a separate opinion. *Id.* at 848-59 (O'Connor, J., concurring) (arguing that the defendant's death sentence should be reversed on the ground that the Oklahoma legislature had not adequately incorporated a minimum age provision in its death penalty statute).

Justice Stevens' opinion relied on two principal elements: "societal factors," and principles of relative culpability: retribution and deterrence. *Id.* at 821-23. Justice Stevens' discussion of "societal factors" began with a review of individual states' laws on juvenile execution. *Id.* at 824-29. Justice Stevens noted that 14 states abolished the death penalty, while an additional 18 states specifically had established a minimum age for applying the death penalty (ranging from 16-18 years). *Id.* at 826-29. Under Justice Stevens' survey, there remained 19 states in which a 15-year-old could receive the death penalty. *Id.* at 826-29 & n.29. Justice Stevens included the District of Columbia in his survey, which accounts for the anomalous total of 51 "states" surveyed. *Id.* at 824 n.16. Justice Stevens added the District of Columbia to a list of 14 states that had abolished the death penalty. *Id.* at 826 n.25. Justice Stevens questioned the specific nature of the position of those 19 states that retained statutes permitting the execution of 15-year-olds, because those 19 legislatures had not "expressly confronted the question of establishing a minimum age for imposition of the death penalty." *Id.* at 826-28. Having established a domestic frame of reference, Justice Stevens then bolstered his argument by referring to international standards. *Id.* at 830-31 (discussing the laws and practices of other nations).

Under the second factor of his analysis, Justice Stevens reasoned that punishment should be related to culpability, and that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." *Id.* at 833-35. Juveniles,

cited data showing that the majority of Western European democracies, and even the Soviet Union, prohibited the execution of minors.¹⁴⁶ Justice Stevens used this data to draw a parallel between the international trend away from the practice of executing minors and a similar domestic trend among state legislative and judicial branches.¹⁴⁷

Justice Scalia's dissent, however, rejected the plurality's reliance on an international frame of reference.¹⁴⁸ Justice Scalia criticized the use of the

Justice Stevens continued, generally are less experienced, less educated, less intelligent, and more susceptible to act based on "mere emotion or peer pressure" than adults. *Id.* at 835.

146. *Id.* at 831 (Stevens, J., plurality opinion). Justice Stevens relied on data provided by Amnesty International concerning death penalty laws in different countries:

Although the death penalty has not been entirely abolished in the United Kingdom or New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed. The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland. Juvenile executions are also prohibited in the Soviet Union.

Id. at 830-31 & n.34 (citing Brief for Amnesty International as *Amicus Curiae*, at A-1 to A-9).

147. *Id.* at 823-31 (Stevens, J., plurality opinion). Justice Stevens also relied on the increasing reluctance among juries to impose the death penalty. *Id.* at 831-32. Justice Stevens noted that only 18-20 persons had been executed during the twentieth century for crimes committed while 16 years old or younger. *Id.* at 832 & n.36. Furthermore, the last such execution had occurred in 1948. *Id.* at 832 & n.37. Justice Stevens also remarked that between 1982 and 1986, only five of the persons who received a death sentence were under 16 years of age when they committed their crimes. *Id.* at 832-33. Echoing *Trop*, Justice Stevens concluded that "it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense." *Id.* at 830.

148. *Id.* at 868 n.4 (Scalia, J., dissenting) (excoriating the plurality's use of the Amnesty International data as "totally inappropriate"). Justice Scalia was joined by Chief Justice Rehnquist and Justice White. *Id.* at 859. Justice Kennedy did not participate in the decision. *Id.* at 818. Justice Scalia took aim at the plurality's contention that a "national consensus" existed opposing the execution of juveniles. *Id.* at 859. Justice Scalia reviewed that data on state laws, which provided an essential foundation for Justice Stevens' opinion, but reached exactly the opposite conclusion. *Id.* at 859-68. Focusing on the 19 states that had retained death penalty statutes, Justice Scalia noted that these states "have determined that no minimum age for capital punishment is appropriate, leaving that to be governed by their general rules for the age at which juveniles can be criminally responsible." *Id.* at 868. Justice Scalia added that many federal and state legislatures recently reduced the minimum age of criminal responsibility. *Id.* at 865-68.

Justice Scalia concluded that the data reflected "the view that death is not different insofar as the age of juvenile criminal responsibility is concerned." *Id.* at 868. Justice Scalia criticized the plurality for its failure to establish any "rational basis for discerning . . . a societal judgment that no one so much as a day under 16 can ever be mature and morally responsible enough to deserve . . . [the death] penalty; and there is no justification except our own predilection for converting a statistical rarity of occurrence into an absolute constitutional ban." *Id.* at 870-71.

Trop standard as one that indulged the subjective views of individual justices.¹⁴⁹ Justice Scalia based his dissent on his interpretation of the original history of the Eighth Amendment.¹⁵⁰ Consequently, Justice Scalia concluded that it was inappropriate to establish that the execution of juveniles under sixteen years of age would violate the Eighth Amendment in all circumstances.¹⁵¹

Justice Scalia's view won majority support just one year later in *Stanford v. Kentucky*.¹⁵² In *Stanford*,¹⁵³ the Court reversed *Thompson* on the issue of executing juveniles, thus sharply narrowing its interpretation of the scope of Eighth Amendment protection.¹⁵⁴ The *Stanford* Court held

149. *Id.* at 864-65. Justice Scalia argued that "the risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one's own views." *Id.* Justice Scalia warned of the dangers of relying on the "perceptions of decency, or of penology, or of mercy, entertained—or strongly entertained, or even held as an 'abiding conviction'—by a majority of the small and unrepresentative segment of our society that sits on this Court." *Id.* at 873.

150. *Id.* at 864 (arguing that there is no evidence supporting the majority's view that the Eighth Amendment was intended to prohibit the execution of minors). Justice Scalia described the Court's task in Eighth Amendment cases as to determine whether a form of punishment violates either the original meaning of the Amendment or the meaning that the Amendment has taken on in modern society. *Id.* at 873.

151. *Id.* at 859 (concluding that neither the history of the Eighth Amendment nor the lack of consensus among state legislatures concerning death penalty statutes provide support for the view that imposing the death penalty on juveniles is unconstitutional). Justice Scalia also rebuked Justice O'Connor for promulgating, in her concurring opinion, a "[s]olomonic solution" that constituted an inappropriate intrusion into the discretion of the Oklahoma state legislature. *Id.* at 874-78.

152. 492 U.S. 361 (1989). The *Stanford* decision marked a remarkable volte-face for a Court whose personnel had not changed during the one-year period since *Thompson*. Justice Scalia and Justice White, along with Chief Justice Rehnquist, all of whom had dissented in *Thompson*, formed the majority in *Stanford* along with Justice Kennedy, who did not participate in the *Thompson* decision, and Justice O'Connor, who concurred in *Stanford* after switching her vote from the position she espoused in a separate concurring opinion in *Thompson*. *Thompson*, 487 U.S. at 857-58; *Stanford*, 492 U.S. at 380 (listing the votes of the justices in each case).

153. *Stanford*, 492 U.S. at 365-66. Justice Scalia commenced his majority opinion with a recitation of the facts of *Stanford's* case:

Petitioner Kevin Stanford committed the murder [of 20-year-old Barbara Poore] on January 7, 1981, when he was approximately 17 years and 4 months of age. Stanford and his accomplice repeatedly raped and sodomized Poore during and after their commission of a robbery at a gas station where she worked as an attendant. They then drove her to a secluded area near the station, where Stanford shot her pointblank in the face and then in the back of her head. The proceeds from the robbery were roughly 300 cartons of cigarettes, two gallons of fuel, and a small amount of cash. . . . Stanford was convicted of murder, first-degree sodomy, first-degree robbery, and receiving stolen property, and was sentenced to death and 45 years in prison.

Id.

154. *Id.* at 369. The Court's holding that the Eighth Amendment does not prohibit the execution of minors reflects the extent to which, in less than 20 years, the Court has dis-

that the imposition of the death penalty on a sixteen or seventeen-year-old minor does not violate the Eighth Amendment.¹⁵⁵ Justice Scalia's

tanced itself from its position in *Furman*, where it held that a death penalty statute violated the cruel and unusual punishments clause, and was therefore unconstitutional. *Id.* at 380. *Contra Furman v. Georgia*, 408 U.S. 238 (1972).

In an article published just prior to the *Stanford* decision, one scholar criticized the use of a "clear-cut 'bright-line' based on chronological age, separating those defendants who may receive the death penalty from those who may not." Hoffmann, *supra* note 38, at 243. While Hoffmann's opposition to a bright-line rule is based on his belief that age alone cannot determine a capital criminal's suitability to receive a death sentence, Justice Scalia's opposition to such a rule is based on his interpretation of the original meaning of the Eighth Amendment. See *Thompson*, 487 U.S. at 873-74 (Scalia, J., dissenting).

155. 492 U.S. at 380. As if to add salt to the wound inflicted on the *Thompson* plurality, Justice Scalia's majority opinion uses the same statistical data relied upon by Justice Stevens in his plurality opinion in *Thompson* to reach the opposite conclusion. *Id.* at 370-77; see also *supra* note 145 and accompanying text (discussing Justice Stevens' survey in *Thompson* of state law on the execution of juveniles). Justice Scalia, in his dissenting opinion in *Thompson*, criticized the conclusions drawn by Justice Stevens from that statistical data. *Thompson*, 487 U.S. at 859-68 (Scalia, J., dissenting). But in his majority opinion in *Stanford*, Justice Scalia based his conclusions on an even more selective interpretation of the data. *Stanford*, 492 U.S. at 370-77. Departing from his interpretation of the same data in *Thompson*, Justice Scalia's opinion in *Stanford* excluded data from the 14 states and the District of Columbia that did not employ capital punishment. *Id.* at 370 n.2; cf. *Thompson*, 487 U.S. at 826-29 (Stevens, J., plurality opinion) (using data from 14 "states," including the District of Columbia, to establish the existence of a societal consensus against the imposition of the death penalty on juveniles). By ignoring data from the 14 states and the District of Columbia that prohibited the death penalty, Justice Scalia's survey showed that 37 states permitted the death penalty, of which 15 explicitly declined to impose the sanction on 16-year-olds, while 12 states declined to impose it on 17-year-olds. *Stanford*, 492 U.S. at 370 n.2. Justice Scalia justified his decision to disregard those 14 states plus the District of Columbia thus:

[w]hile the number of those jurisdictions bears upon the question whether there is a consensus against capital punishment altogether, it is quite irrelevant to the specific inquiry in this case: whether there is a settled consensus in favor of punishing offenders under 18 differently from those over 18 insofar as capital punishment is concerned. The dissent's position is rather like discerning a national consensus that wagering on cockfights is inhumane by counting within that consensus those States that bar all wagering.

Id.

Curiously, however, just one year earlier, in his dissenting opinion in *Thompson*, Justice Scalia did not argue for the exclusion of data from the 14 "states," including the District of Columbia, that had abolished the death penalty. *Thompson*, 487 U.S. at 859-78 (Scalia, J., dissenting). Instead, Justice Scalia attempted to diminish the impact of that data by arguing that those states only recently abolished the death penalty and, therefore, the trend reflected a preference for "individualized sentencing determinations rather than automatic death sentences." *Id.* at 870.

Justice Brennan's dissenting opinion, in which he was joined by Justices Marshall, Blackmun, and Stevens, recorded the statistical data on state law in clear, unvarnished terms that exposed the crude gerrymandering behind Justice Scalia's arithmetic. *Stanford*, 492 U.S. at 384-86 (Brennan, J., dissenting). Justice Brennan stated the position of the states directly:

I do not suggest . . . that laws of these States cut *against* the constitutionality of the juvenile death penalty—only that accuracy demands that the baseline for our

majority opinion recognized the validity of the *Trop* benchmark.¹⁵⁶ Justice Scalia emphasized, however, that, in measuring the “evolving standards of decency that mark the progress of a maturing society,” the true benchmark is the standard of “modern American society as a whole.”¹⁵⁷ Reiterating his dissenting position in *Thompson*, Justice Scalia cautioned against the use of either an individual justice’s subjective views or the use of the practices of other nations.¹⁵⁸

Justice O’Connor’s change of position from *Thompson* to *Stanford* provided the crucial vote resulting in the Court’s about-face.¹⁵⁹ In *Thompson*, Justice O’Connor argued that, although a national consensus against the execution of juveniles probably existed, the evidence did not clearly warrant its establishment as a principle of constitutional law.¹⁶⁰ Justice O’Connor concurred in the judgment on the narrower ground that the Oklahoma statute’s failure to establish a minimum age for the application of the death penalty for murder opened the door to the unconstitu-

deliberations should be that 27 States refuse to authorize a sentence of death in the circumstances of petitioner Stanford’s case . . . ; that 19 States have not squarely faced the question; and that only the few remaining jurisdictions have explicitly set an age below 18 at which a person may be sentenced to death.

Id. at 385. Incidentally, the discrepancy between the 14 “states” (including the District of Columbia) cited in *Thompson* as prohibiting the death penalty, and the 14 states *plus* the District of Columbia cited in *Stanford* may be attributable to the inclusion of Vermont in the tally of death penalty opponents by Justice Brennan in his dissent in *Stanford*. *See id.* at 384 n.1.

156. *Stanford*, 492 U.S. at 369.

157. *Id.* (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). Justice Scalia argued that there are two ways of measuring the standards of “modern American society as a whole.” *Id.* Justice Scalia first evaluated the various state legislatures’ enactments of death penalty statutes. *Id.* at 370-77. He found no clear trend toward abolition of the death penalty. *Id.* Second, Justice Scalia considered the history of American society in general, and of the Eighth Amendment in particular. *Id.* at 377-80. Again, he found no mandate or consensus for prohibiting the use of the death penalty. *Id.*

158. *Id.*; cf. *Thompson*, 487 U.S. at 864-65 (Scalia, J., dissenting) (stating that “the risk of assessing evolving standards [‘of decency that mark the progress of a maturing society’] is that it is all too easy to believe that evolution has culminated in one’s own views”). Justice Scalia appeared to challenge the very basis of the *Trop* standard in his dissenting opinion in *Thompson*. *Id.* In his majority opinion in *Stanford*, however, Justice Scalia did not question the *Trop* standard itself, but merely its interpretation. *Stanford*, 492 U.S. at 369 (emphasizing that the *Trop* standard should be measured by the conceptions of decency of “modern American society as a whole”).

159. *See Thompson*, 487 U.S. at 848 (O’Connor, J., concurring); *Stanford*, 492 U.S. at 380 (O’Connor, J., concurring in part and concurring in the judgment).

160. *Thompson*, 487 U.S. at 848-49 (O’Connor, J., concurring). Justice O’Connor stated that “[a]lthough I believe that a national consensus forbidding the execution of any person for a crime committed before the age of 16 very likely does exist, I am reluctant to adopt this conclusion as a matter of constitutional law without better evidence than we now possess.” *Id.*

tional execution of juveniles under fifteen years of age.¹⁶¹ In *Stanford*, Justice O'Connor agreed with the majority that no national consensus forbidding the execution of juveniles over sixteen years old existed.¹⁶² Justice O'Connor parted company with the majority, however, on the issue of proportionality.¹⁶³

Justice Brennan's dissent examined the alternative view.¹⁶⁴ He argued that the legislation and practices of other nations could assist our constitutional interpretation in this area.¹⁶⁵ Justice Brennan specifically cited human rights treaties that the United States had ratified or signed that either prohibit or express hostility toward the practice of executing juveniles.¹⁶⁶ He took judicial notice of data showing that the United States executes more juveniles than other nations.¹⁶⁷ Justice Brennan urged that the United States should not embrace the practice of executing juveniles at a time when other nations were distancing themselves from such a practice.¹⁶⁸

c. *The Proportionality Doctrine*

Despite the historical role of proportionality analysis in Eighth

161. *Id.* at 857-59. Justice O'Connor stated that "I am prepared to conclude that petitioner and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution." *Id.* at 857-58. In other words, Justice O'Connor had sufficient confidence that a national consensus existed to oppose the execution of 15-year-old juveniles, but that no such consensus existed regarding 16-year-olds. *Id.*

162. 492 U.S. at 380-81 (O'Connor, J., concurring in part and concurring in the judgment).

163. *Id.* at 382. Justice O'Connor argued that "there remains a constitutional obligation imposed upon this Court to judge whether the 'nexus between the punishment imposed and the defendant's blameworthiness' is proportional." *Id.* (quoting *Enmund v. Florida*, 458 U.S. 782, 825 (1982) (O'Connor, J., dissenting)).

164. *Id.* at 382-405 (Brennan, J., dissenting).

165. *Id.* at 389-90.

166. *Id.*

167. *Id.* at 389. This is part of a broader international trend to repudiate the death penalty. See John Pak, *Canadian Extradition and the Death Penalty: Seeking a Constitutional Assurance of Life*, 26 CORNELL INT'L L.J. 239, 239 nn.2-3 (1993) (listing 17 countries that have abolished the death penalty for specific crimes and 44 other countries that have abolished the punishment altogether); see also *infra* notes 376-85 and accompanying text (discussing the United States' attachment of a reservation to its ratification of ICCPR to permit the continued execution of 16 or 17-year-old juveniles in light of *Stanford*).

168. *Stanford*, 492 U.S. at 390 (Brennan, J., dissenting). Justice Brennan's approach in *Stanford* is consistent with the Court's majority opinion in *Estelle v. Gamble*, where the Court cited, *inter alia*, United Nations' documents as an appropriate measure of the *Trop* standard. Compare *Stanford*, 492 U.S. at 390 n.10 with *Estelle v. Gamble*, 429 U.S. 97, 103-04 n.8 (1976).

Amendment jurisprudence,¹⁶⁹ the Supreme Court recently demonstrated a reluctance to rely on the proportionality doctrine as a tool for interpreting the Eighth Amendment.¹⁷⁰ In *Harmelin v. Michigan*,¹⁷¹ the Court narrowed the proportionality doctrine.¹⁷² Although five justices subscribed to the result of the case announced in Justice Scalia's opinion, the Court was strongly divided as to its reasoning, and two of the majority's justices joined Justice Kennedy's concurring opinion.¹⁷³

Justice Kennedy distinguished his view of Eighth Amendment proportionality analysis from that of Justice Scalia.¹⁷⁴ Justice Kennedy argued that "*stare decisis* counsels our adherence to the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years."¹⁷⁵ Justice Kennedy adapted a three-step test previously announced in *Solem v. Helm*.¹⁷⁶ The first step considers the gravity of the

169. See *supra* notes 25-39 and accompanying text (discussing the establishment of the proportionality doctrine in *Weems v. United States*, 217 U.S. 349, 377 (1910) and *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

170. See *Harmelin v. Michigan*, 501 U.S. 957, 994-96 (1991); *Solem v. Helm*, 463 U.S. 277, 288 (1983) (narrowing the scope of the proportionality doctrine in Eighth Amendment jurisprudence).

171. 501 U.S. 957 (1991). In *Harmelin*, the petitioner was convicted of possessing 672 grams of cocaine. *Id.* at 961 (Scalia, J., plurality opinion). The Court held that a mandatory term of life imprisonment without the possibility of parole did not violate the Eighth Amendment. *Id.* at 994-96.

172. *Id.* at 994-95. The proportionality doctrine is based on the belief that the punishment should be commensurate to the crime for which the individual has been convicted. *Id.*

173. *Id.* at 960. The majority comprised Justice Scalia, who announced the decision of the Court, Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy, and Justice Souter. *Id.* Justice Kennedy, however, wrote an opinion concurring in part, in which Justices O'Connor and Souter joined. *Id.* Justices White, Marshall, Stevens, and Blackmun dissented. *Id.*

174. *Id.* at 996-1009 (Kennedy, J., concurring in part and concurring in the judgment).

175. *Id.* at 996. Justice Kennedy delineated a network of "common principles that give content to the uses and limits of proportionality review." *Id.* at 998. Justice Kennedy described these principles thus:

All of these principles—the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors—inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.

Id. at 1001 (quoting *Solem v. Helm*, 463 U.S. 277, 288, 303 (1983)). For a more detailed explanation of each of Justice Kennedy's principles, see *id.* at 998-1001.

176. 463 U.S. 277 (1983). In *Solem*, defendant Jerry Helm, whose record included six nonviolent felonies, was convicted in a South Dakota state court of uttering a "no account" check for \$100. *Id.* at 279-83. Although ordinarily this offense would attract a maximum punishment of five years' imprisonment and a \$5,000 fine, based on the defendant's felonious history, he was sentenced to life imprisonment without the possibility of parole. *Id.* at 282-83. The defendant brought a habeas corpus action, contending that his sentence con-

offense for which the defendant was convicted and the harshness of the penalty imposed.¹⁷⁷ If the court finds an inference of gross disproportionality, it then considers the second step, which asks whether crimes of equal or greater gravity are subject to the same penalty in that jurisdiction.¹⁷⁸ The third step repeats the inquiry of the second step, but seeks comparisons with other jurisdictions.¹⁷⁹ Applying the test to Harmelin's case, Justice Kennedy concluded that the sentence that the Michigan court imposed was valid under the first step of the test, thus obviating the need for any comparative analysis under the second and third steps.¹⁸⁰

Justice Scalia, in a portion of his opinion joined by only Chief Justice Rehnquist, directly attacked the proportionality doctrine.¹⁸¹ Justice Scalia argued that Harmelin's sentence did not violate the Eighth Amendment on proportionality grounds because the Eighth Amendment contains no guarantee of proportionality.¹⁸² Justice Scalia noted that the Eighth Amendment does not contain textual or historical references to proportionality.¹⁸³ In the absence of such a specific proportionality re-

stituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. *Id.* at 283. The United States District Court for the District of South Dakota denied relief, but the United States Court of Appeals for the Eighth Circuit reversed. *Id.* The Supreme Court affirmed and held that the Eighth Amendment prohibits sentences that are disproportionate to the crime committed. *Id.* at 284. Justice Powell wrote the majority opinion on behalf of Justices Brennan, Marshall, Blackmun, and Stevens. *Id.* at 279. Chief Justice Burger's dissenting opinion was joined by Justices White, Rehnquist, and O'Connor. *Id.*

177. *Id.* at 291.

178. *Id.*

179. *Id.* at 291-92.

180. *Harmelin*, 501 U.S. at 1004-05 (Kennedy, J., concurring). Justice Kennedy's test differs from the *Solem* test in that Justice Kennedy considers the first step a threshold question. *Id.* If the defendant prevails on this question, the inquiry proceeds to the second and third steps. *Id.* at 1005. If, however, the defendant fails to establish an inference of gross disproportionality at the first step, then the inquiry is terminated. *Id.* Justice Kennedy, at the first step of the test, concluded that "[t]he severity of petitioner's crime brings his sentence within the constitutional boundaries established by our prior decisions." *Id.* at 1004. Rejecting the petitioner's demands for "comparative analysis between petitioner's sentence and sentences imposed for other crimes in Michigan and sentences imposed for the same crime in other jurisdictions," Justice Kennedy added that "[g]iven the serious nature of petitioner's crime, no such comparative analysis is necessary." *Id.* Justice Kennedy continued that "intra-jurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality," and that "[t]he proper role for comparative analysis of sentences, then, is to validate an initial judgment that a sentence is grossly disproportionate to a crime." *Id.* at 1005.

181. *Id.* at 962-65 (Scalia, J.).

182. *Id.* at 990.

183. *Id.* at 975-85. Justice Scalia recognized that the origins of the Eighth Amendment lie in the English Bill of Rights of 1689, which prohibited "cruell and unusuall [sic] punishments." *Id.* at 966. Justice Scalia, however, could discern no incorporation of a guarantee of proportionality in the English Bill of Rights. *Id.* at 966-67. Justice Scalia argued that

quirement, Justice Scalia concluded that the length of sentence imposed for a particular category of felony is a matter of legislative prerogative.¹⁸⁴

Justice White, in his dissenting opinion, argued that a proportionality doctrine exists and must be incorporated into Eighth Amendment analysis.¹⁸⁵ Justice White identified two weaknesses in Justice Scalia's approach. First, by disregarding all forms of proportionality analysis, the Scalia approach fails to provide any restraint on even the most egregiously disproportionate sentences.¹⁸⁶ Second, Justice White argued that, by eliminating proportionality analysis, Justice Scalia undermined the foundation that the Court had established to justify the constitutionality of the death penalty.¹⁸⁷

Justice White took issue with Justice Scalia's reliance on, and interpre-

the English Bill of Rights was aimed at restricting the King's Bench from imposing arbitrary sentences. *Id.* at 967-74. In other words, the English Bill of Rights was concerned with illegal sentences, but not with disproportionate sentences. *Id.*

Justice Scalia concluded that the Framers of the Eighth Amendment of the United States Constitution shared the English concern with preventing illegal sentences, but failed to incorporate an explicit guarantee against disproportionate sentences. *Id.* at 975-85. Justice Scalia reasoned that this lack of a textual or historical frame of reference means that modern judges lack any standard by which to measure disproportionality. *Id.* at 985-90. Justice Scalia argued that the first two of the *Solem* factors cannot be judged by objective criteria, and that judges who seek to apply these two factors inevitably must succumb to the application of their own subjective values. *Id.* at 987-89. Justice Scalia acknowledged that the third *Solem* factor can be clearly and easily applied, but he discounted it as being irrelevant to Eighth Amendment jurisprudence. *Id.* at 989.

In *Solem*, the Court recognized a proportionality principle under the Eighth Amendment, but Justice Scalia argued that "*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee." *Id.* at 965. Justice Scalia would reduce the *Solem* inquiry to just one question: whether a punishment is "cruel and unusual" under a historical interpretation of the Eighth Amendment. *Id.* at 994-95. Justice Kennedy disagreed with Justice Scalia on this point, arguing that the Eighth Amendment does allow for a "narrow proportionality principle." *Id.* at 996 (Kennedy, J., concurring). Justice White, in his dissenting opinion, criticized both Justice Kennedy and Justice Scalia for respectively seeking to narrow and eviscerate *Solem*'s guarantee of proportionality. *Id.* at 1018 (White, J., dissenting).

184. *Id.* at 996 (Scalia, J.).

185. *Id.* at 1009-27 (White, J., dissenting). Justice White argued that, although the language of the Eighth Amendment does not include reference to proportionality, the Court's longstanding trend has been to incorporate the proportionality doctrine into its Eighth Amendment decisions. *Id.* at 1009-12. Justice White also cited the *Trop* standard as playing a part in the objective element of the *Solem* proportionality test. *Id.* at 1015.

186. *Id.* at 1018. Justice White derided Justice Scalia's approach for failing to combat a hypothetical situation in which "a legislature makes overtime parking a felony punishable by life imprisonment." *Id.*

187. *Id.* Justice White explained that:

Justice Scalia's position that the Eighth Amendment addresses only modes or methods of punishment is quite inconsistent with our capital punishment cases, which do not outlaw death as a mode or method of punishment, but instead put limits on its application. If the concept of proportionality is downgraded in the

tation of, original history.¹⁸⁸ Both Justice Scalia and Justice White agreed that the Eighth Amendment's origins lie in the English Bill of Rights of 1689.¹⁸⁹ Justice White, however, argued that the Cruel and Unusual Punishments Clause of the English Bill of Rights intended to serve two purposes: to prevent the imposition of non-statutory punishments, and to reflect a policy against disproportionate punishments.¹⁹⁰ In contrast, Justice Scalia reasoned that, although the English may have had a policy against disproportionality, that policy was not reflected in the English Bill of Rights.¹⁹¹

B. Review of Decisions Applying the International Standard

Decisions of the European Commission of Human Rights [European Commission] and the European Court of Human Rights [European Court] provide useful sources of interpretation of the international standard.¹⁹² In addition, decisions of the United Nations Human Rights

Eighth Amendment calculus, much of this Court's capital penalty jurisprudence will rest on quicksand.

Id. (emphasis omitted).

188. *Id.* at 1011 & n.1. Justice White was not satisfied by Justice Scalia's or Justice Kennedy's approach. *Id.* at 1018. "While Justice Scalia seeks to deliver a swift death sentence to *Solem*, Justice Kennedy prefers to eviscerate it, leaving only an empty shell." *Id.* (emphasis omitted). One scholar stated that "[a]lthough *Harmelin* did not expressly overrule *Solem* . . . it appears to have done so *sub silentio*." Sherry F. Colb, *Freedom From Incarceration: Why Is This Right Different From All Other Rights?*, 69 N.Y.U. L. REV. 781, 783 n.9 (1994).

189. *Harmelin*, 501 U.S. at 966-75 (Scalia, J.) (arguing that the Eighth Amendment derives from the prohibition of the English Bill of Rights of 1689 against "cruell and unusuall [sic] [p]unishments"; *id.* at 1011 n.1 (White, J., dissenting) (noting that both he and Justice Scalia agree that the Eighth Amendment's origins lie in the English Bill of Rights).

190. *Id.*

191. *Id.* at 975 n.5 (Scalia, J.). The debate between Justice Scalia and Justice White over the original history of the Eighth Amendment focuses substantially on one particular, much-quoted law review article. See Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839 (1969). Granucci's thesis is that the Framers of the Eighth Amendment misinterpreted the English Bill of Rights of 1689. *Id.* at 839.

192. See *infra* notes 194-250 and accompanying text (describing and analyzing decisions under the European Convention). For a detailed explanation of the procedures and implementation of the European Convention, see VAN DIJK & VAN HOOF, *supra* note 15; THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS (Ronald St. J. Macdonald et al. eds., 1993); L.J. CLEMENTS, EUROPEAN HUMAN RIGHTS: TAKING A CASE UNDER THE CONVENTION (1994); RALPH BEDDARD, HUMAN RIGHTS AND EUROPE (3d ed. 1993); J.E.S. FAWCETT, THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1987); FRANCIS G. JACOBS, THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1975); HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW (A.H. Robertson ed., 1968); A.H. Robertson, *The European Convention on Human Rights*, in THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 99 (Evan Luard ed., 1967).

By July 28, 1994, a total of 30 nations ratified the European Convention. *Chart of Ratifications of the ECHR*, 15 HUM. RTS. L.J. 114 (1994) (providing a chart of ratifications of the European Convention and additional Protocols). When a state ratifies the Convention, it accepts the jurisdiction of the European Commission of Human Rights to receive complaints from other States parties, alleging that it has violated the Convention. European Convention, *supra* note 15, art. 24. The Commission comprises 21 members, each elected for a six-year period by the Committee of Ministers. *See id.* art. 20-22. Members of the Commission serve in a personal capacity. *Id.* art. 23. The Committee of Ministers, the governing body of the Council of Europe, retains authority to decide cases not presented to the Commission and to execute judgments of the European Court of Human Rights. *Id.* arts. 32, 54.

An individual may bring a private petition against a State party, alleging a violation of the Convention, provided that state has recognized the right of the Commission to entertain private petitions against it. *Id.* art. 25(1). This requires a special declaration by the State party. *Id.* "By 1993 . . . 28 of 32 Council of Europe member-states had recognized the Court's jurisdiction and the same 28 states had ratified the European Convention." NEWMAN & WEISSBRODT, *supra* note 3, at Supp. 116.

The Convention attaches certain conditions to the admissibility of private petitions:

(a) The petitioner must be a "victim of the violation." European Convention, *supra* note 15, art. 25(1).

(b) The petition must not be "incompatible with the provisions of the present Convention, manifestly ill-founded, or an abuse of the right of petition." *Id.* art. 27(2); *see also* Cruz Varas v. Sweden, 201 Eur. Ct. H.R. (ser. A) (1991), *reprinted in* 12 HUM. RTS. L.J. 142, 153 (1991) (ruling that extradition could proceed where petitioner failed to establish "[s]ubstantial ground" to believe that his return to Chile would expose him to a real risk of being subjected to inhuman or degrading treatment).

(c) The petitioner must have exhausted all available domestic remedies. European Convention, *supra* note 15, art. 27(3). Under extreme circumstances, however, the exhaustion requirement may be waived. *See* Aksoy v. Turkey, (Decision on admissibility of 19 Oct. 1994, App. No. 21987/93), *reprinted in* 15 HUM. RTS. L.J. 394, 398 (1994) (waiving requirement to exhaust all domestic remedies where applicant, having filed a complaint with a prosecutor, was threatened and subsequently died in unexplained circumstances); Akduvar et al. v. Turkey, (Decision on admissibility of 19 Oct. 1994, App. No. 21893/93), *reprinted in* 15 HUM. RTS. L.J. 399, 403 (1994) (ruling that petitioners who alleged that government soldiers destroyed their village and forced them to evacuate did not need to exhaust domestic remedies that the Commission found "lack[ed] the requisite accessibility and effectiveness").

The Commission generally seeks to "place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for Human Rights as defined in this Convention." European Convention, *supra* note 15, art. 28(b). Such a settlement might involve a State party agreeing to pay compensation or make other restitution, but usually is conditioned on the State party's refusal to admit that a violation occurred. *See, e.g.,* Amekrane v. United Kingdom, 16 Y.B. Eur. Conv. on H.R. 356 (1973) (Eur. Comm'n on H.R.). In *Amekrane*, following an application to the Commission, the United Kingdom paid Sterling 37,500 to the widow of Lieutenant-Colonel Amekrane of the Moroccan army. Rita Maran, *Against Torture - Three Spheres of Law*, 4 HUM. RTS. REV. 85, 88 (1979). Amekrane had been extradited from Gibraltar to Morocco where he was convicted of attempting to assassinate the King of Morocco. *Amekrane*, 16 Y.B. Eur. Conv. on H.R. at 358-60. Amekrane subsequently was executed. *Id.* at 366. On payment of the settlement, the Commission was not required to issue a report. Maran, *supra*, at 88; *see also* Diaz Ruano v. Spain, 285-B Eur. Ct. H.R. (ser. A) (1994), *reprinted in* 15 HUM. RTS. L. J. 211, 211 (1994) (following a European Commission decision in favor of

Committee [UNHRC] also offer interpretive guidance.¹⁹³

1. *Decisions under the European Convention*

Article 3 of the European Convention on Human Rights and Fundamental Freedoms [European Convention] states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."¹⁹⁴ The landmark case defining torture under article 3 was the *Greek Case*,¹⁹⁵ in which the European Commission established a definition of torture that broadly conformed to the United Nations' definition under Resolution 3452.¹⁹⁶ Since the *Greek Case*, however, the European

petitioner, the parties reached a friendly settlement). If settlement efforts fail, then the Commission will compile a report. European Convention, *supra* note 15, art. 31(1). The Commission's report sets forth the facts of the case and an opinion as to whether a violation of the Convention has occurred. *Id.* Once the report is compiled, it is submitted to the Committee of Ministers. *Id.* art. 31(2). If the parties decline to refer the case to the European Court of Human Rights, the Committee must decide whether a violation of the Convention has occurred. *Id.* art. 32(1). The court comprises the "number of judges equal to that of the Members of the Council of Europe." *Id.* art. 38. Each judge is elected to serve a nine-year term by the Consultative Assembly of the Council of Europe from a list of three nominees submitted by each Member State of the Council. *Id.* art. 39(1), 40(1).

The Committee of Ministers is empowered to enforce judgments of the court. *Id.* art. 54. This may take the form of money damages, an order that the offending state reform its conduct to conform with the Convention, or some combination of these. *See id.* art. 50; *see also* VAN DIJK & VAN HOOF, *supra* note 15, at 171-85 (discussing the award of compensation under article 50).

The requirement that cases reach the European Court of Human Rights only on referral from the European Commission increases the likelihood that individual cases may fall prey to political forces or bureaucratic inertia. *See, e.g.,* East African Asians v. United Kingdom, App. Nos. 4403/70-4419/70, 4422/70, 4423/70, 4434/70, 4443/70, 4476/70-4478/70, 4486/70, 4501/70, 4526/70-4530/70, 78-A, 31 Eur. Comm'n H.R. Dec. & Rep. 76 (1973), *reprinted in* 15 HUM. RTS. L.J. 215 (1994). In *East African Asians*, the Commission heard the case in 1973 and expressed the view that article 3 of the European Convention on Human Rights had been violated. *Id.* However, neither the Commission nor the United Kingdom government referred the case to the European Court of Human Rights. *Id.* When the case failed to attract the necessary two-thirds vote at the Committee of Ministers, it was "removed from the Committee of Ministers' agenda." *Id.* The Commission report was published over twenty years later, in March 1994. *Id.*

The tripartite structure of the Commission, the Committee of Ministers, and the European Court is in the process of being replaced by a single European Court of Human Rights. *See infra* note 196 (discussing the recent adoption of Protocol No. 11 to the European Convention, aimed at creating a single European Court of Human Rights to adjudicate all claims under the Convention).

193. *See infra* notes 251-89 and accompanying text (discussing decisions and procedures of the UNHRC).

194. European Convention, *supra* note 15, art. 3.

195. *Greek Case*, 12 Y.B. Eur. Conv. On H.R. 1 (1969) (Eur. Comm'n on H.R.).

196. Resolution 3452, *supra* note 14. The Commission's report in the *Greek Case* stated that "[i]t is plain that there may be treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment, and inhuman treatment also

Commission and the European Court developed definitional distinctions between the concept of torture and the lesser, yet still significant, concept of "inhuman or degrading treatment or punishment."¹⁹⁷

In *Ireland v. United Kingdom*,¹⁹⁸ the European Court considered whether British authorities' treatment of detainees in Northern Ireland violated article 3.¹⁹⁹ The court specifically considered five techniques

degrading." *Greek Case*, 12 Y.B. Eur. Conv. on H.R. at 186. More specifically, the Commission described inhuman treatment as "such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable." *Id.* One author suggested that the only significant distinction between the United Nations and European Union definitions is the absence in the United Nations definition of the element of justifiability. Maran, *supra* note 192, at 87.

197. See, e.g., *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 66-67 (1978) (defining "torture"); *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 35 (1989) (defining "degrading treatment or punishment"); *Tyrer v. Isle of Man*, 26 Eur. Ct. H.R. (ser. A) at 14-17 (1978) (defining "degrading treatment").

Under a protocol signed in May, 1994, States parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms have agreed to replace the present system with one that incorporates the Court and the Commission into a single European Court of Human Rights. *Council of Europe: Explanatory Report and Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby*, reprinted in 33 I.L.M. 943, 960 (1994) [hereinafter *Explanatory Report*], signed May 11, 1994 (all but one of the 32 member states of the Council of Europe signed the Protocol). See Kevin Boyle, Book Review, 89 AM. J. INT'L L. 241 (1995) (reviewing *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* (Ronald St. J. Macdonald et al. eds., 1993)) (describing the impact of the proposed unified structure as enabling the individual to "have direct access to an international court to complain about violation of a Convention right").

The Explanatory Report issued by the Council of Europe describes how the tripartite system (incorporating the Commission, the Committee of Ministers, and the Court) originally was created to combat the threat of frivolous litigation and to prevent the political manipulation of the Court. *Explanatory Report, supra*, at 946.

The Explanatory Report documents how the growth of the volume of cases lodged with the Commission, partly a result of the increasing number of States parties to the Convention, stimulated the impetus for a unified structure pursuant to Protocol No. 11. *Id.* at 948 (explaining that "[t]he number of applications registered with the Commission has increased from 404 in 1981 to 2,037 in 1993"). The Explanatory Report recognizes that "[t]he backlog of cases before the Commission is considerable." *Id.* The Explanatory Report acknowledges that "it takes on average over 5 years for a case to be finally determined by the Court or the Committee of Ministers." *Id.* The Explanatory Report concludes that "[t]he reform proposed is thus principally aimed at restructuring the system, so as to shorten the length of Strasbourg proceedings. There is need for a supervising machinery that can work efficiently and at acceptable costs even with forty member States and which can maintain the authority and quality of the case-law in the future." *Id.* at 948-49. The Explanatory Report provides a detailed description of the main features of the new system under Protocol No. 11. *Id.* at 949-51. See also 15 HUM. RTS. L.J. 81 (1994) (reproducing both Protocol No. 11 and the Explanatory Report, and containing a chart of ratifications by member states of the European Convention and additional Protocols).

198. 25 Eur. Ct. H.R. (ser. A) (1978).

199. *Id.* at 25. The government of Ireland initially lodged an application with the European Commission alleging that the British authorities had violated article 3. *Id.* The Com-

that the British authorities used on Irish detainees.²⁰⁰ The court first agreed with the European Commission that, to trigger article 3, alleged violations must attain a "minimum level of severity."²⁰¹ The court then explained the difference between torture and inhuman or degrading treatment as a matter of degree reflected by the intensity of the suffering inflicted.²⁰² The court interpreted torture as attaching a particular stigma to "deliberate inhuman treatment causing very serious and cruel suffering."²⁰³ The court explained that, in assessing evidence of a possible article 3 violation, all facts and circumstances must be taken into account.²⁰⁴

The court held that although the five techniques did not amount to torture, they did constitute inhuman or degrading treatment, and as such violated article 3.²⁰⁵ The court's opinion suggested that the totality of all

mission filed a report. 19 Y.B. Eur. Conv. on H.R. 512 (1976) (Eur. Comm'n on H.R.). The Irish government then referred the case to the European Court of Human Rights. *Ireland*, 25 Eur. Ct. H.R. at 25.

200. The Court cited the Commission's description of the five techniques of British authorities that were at issue in the *Ireland Case*. *Id.* at 41. These techniques comprised: (a) "wall-standing" (forcing detainees to stand for hours at a time spread-eagled against a wall); (b) "hooding" (putting a bag over detainees' head and leaving it there at all times except during interrogation); (c) "subjection to noise" (detainees were kept in a room with a loud and continuous hissing noise); (d) sleep deprivation; and (e) "deprivation of food and drink." *Id.*

201. *Id.* at 65. The Commission report, citing the *Greek Case*, distinguished article 3 violations from other cases involving "a certain roughness of treatment." *Ireland*, 19 Y.B. Eur. Conv. on H.R. at 748 (citing the *Greek Case*, 12 Y.B. Eur. Conv. on H.R. 1 (1969) (Eur. Comm'n on H.R.)). The Commission stipulated that the minimum level of severity may vary between different nations and even between different sections of a society. *Id.* The court emphasized that the relative nature of this standard requires an examination of the totality of the circumstances of a particular case. *Ireland*, 25 Eur. Ct. H.R. at 65; see also Maran, *supra* note 192, at 87.

202. *Ireland*, 25 Eur. Ct. H.R. at 66.

203. *Id.* In support of its definition of torture, the Court cited Resolution 3452, stating that "[t]orture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment." Resolution 3452, *supra* note 14, art. 1.

204. *Ireland*, 25 Eur. Ct. H.R. at 65. Rita Maran argues that "[w]hile there is no question about the absolute nature of the prohibition contained in Article 3, the notion of torture or inhuman treatment is not absolute." Maran, *supra* note 192, at 87. Maran argues that the distinction between an absolute and a relative definition of torture explains the difference of opinion between the European Commission and the European Court in the *Ireland Case*. *Id.* The Commission adopted an absolutist definition, but the Court rejected this in favor of a relativist approach. *Id.* at 87-88. Maran argues that in establishing that torture has occurred, "[t]he severity of suffering is a crucial element, as is its purpose, and both are necessarily subject to interpretation, when an assessment of torture needs to be made." *Id.* Maran also argues that the Commission's decision in *Amekrane* used a relativist approach to the determination of inhuman treatment. *Id.* Maran concludes that the differences of interpretation prompted by such a relative definition create considerable difficulties for the victim who seeks to establish a claim of torture under article 3. *Id.* at 88-89.

205. *Ireland*, 25 Eur. Ct. H.R. at 66. The Commission found that the treatment of de-

five techniques combined to establish an article 3 violation.²⁰⁶ It is by no means certain that any one of these forms of treatment alone would be sufficient.²⁰⁷

The *Ireland Case* provides an illustration of the broader scope of protection available under the international standard as opposed to the Eighth Amendment of the United States' Constitution. First, the *Ireland Case* concerned treatment,²⁰⁸ rather than punishment.²⁰⁹ A petitioner bringing a factually similar claim under United States law would be unable to rely on the Eighth Amendment, which prohibits only "cruel and unusual *punishments*."²¹⁰ Second, by differentiating between torture and inhuman or degrading treatment, article 3 protects against a spectrum of treatments or punishments once the "minimum level of severity" is established.²¹¹ By contrast, under the Eighth Amendment, a minimum threshold applies.²¹² But if, for example, the Supreme Court considered "cruel and unusual punishments"²¹³ analogous to torture, then "inhuman or degrading . . . punishment"²¹⁴ might fail to pass the Eighth Amendment's

tainees constituted torture under article 3, but the court disagreed, and availed itself of the opportunity to clarify its distinction between torture and inhuman or degrading treatment. *Id.* at 66-67.

206. *Id.*

207. *Id.*

208. See *supra* note 205 and accompanying text (noting that, while the Commission ruled that the detainees' treatment constituted torture, the Court defined it as inhuman or degrading treatment).

209. *Ireland*, 25 Eur. Ct. H.R. at 10. The detainees in the *Ireland Case* were held under "a series of extrajudicial powers of arrest, detention and internment." *Id.* These powers enabled the British authorities to hold a suspect for 48 hours without issuing charges. *Id.* at 32 (citing Regulation 10, Civil Authorities (Special Powers) Act (Northern Ireland) (1971)). Furthermore, under Regulation 12(1) of the same statute, the British authorities could, at their discretion, hold a detainee for an unlimited period of time. *Id.* at 34-35. These emergency measures were enacted as a specific response to the Irish Republican Army's terrorist campaign in Northern Ireland. *Id.* at 10. Since no court had convicted the detainees of any crime, any deprivations must be termed as treatment, rather than punishment. See *infra* note 291 and accompanying text (noting the distinction between treatment and punishment).

210. U.S. CONST. amend. VIII. Of course, this hypothetical petitioner could base his claim on other constitutional provisions or on statutory law. See U.S. CONST. amends. V, XIV (Due Process and Equal Protection Clauses); see also *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395-97 (1971) (ruling that, under the Civil Rights Act, 42 U.S.C. § 1983, individuals may recover damages against federal officials who violate their constitutional rights).

211. *Ireland*, 25 Eur. Ct. H.R. at 65.

212. See *Farmer v. Brennan*, 114 S. Ct. 1970, 1973 (1994) (reiterating the holding in *Wilson v. Seiter*, 501 U.S. 294, 298 (1991), requiring a plaintiff to show that the injury suffered is "sufficiently serious" to trigger an Eighth Amendment inquiry).

213. U.S. CONST. amend. VIII.

214. European Convention, *supra* note 15, art. 3.

minimum threshold.²¹⁵ Third, the *Ireland Case* recognized that article 3 protects against the psychological impact of treatment while in detention, although the court did not premise its decision on this form of violation.²¹⁶ The Supreme Court, on the other hand, has not clearly established the Eighth Amendment's applicability to cases of psychological harm.²¹⁷

A recent decision of the European Court clarified the "minimum level of severity" threshold requirement for bringing an article 3 claim of "inhuman or degrading treatment."²¹⁸ *Tomasi v. France*²¹⁹ concerned a French national detained by French authorities for over five years before he was finally acquitted.²²⁰ Tomasi brought an article 3 action, alleging that French authorities had beaten and mistreated him while in detention.²²¹ The European Court found that, despite evidence of only slight physical injuries, the requisite "minimum level of severity" of ill-treatment had occurred.²²² The court recognized that where a detainee suffers physical injuries while in custody, absent evidence to the contrary, an inference exists that the detaining authorities bear responsibility for those injuries.²²³

In 1978, the European Court decided *Tyrer v. Isle of Man*,²²⁴ and further clarified the meaning of the "degrading punishment" language of article 3. In *Tyrer*, a fifteen-year-old minor appealed his assault convic-

215. See *Wilson v. Seiter*, 501 U.S. 294, 305-06 (1991) (emphasizing that a petitioning prisoner must pass a minimum threshold, which, for example, "mere negligence" would not satisfy, but failing to define that threshold).

216. *Ireland*, 25 Eur. Ct. H.R. at 66-67. The court recognized that the detainees had suffered "degrading treatment" in violation of article 3. *Id.* at 67.

217. See *Farmer*, 114 S. Ct. at 1986-89 (Blackmun, J., concurring) (discussing the applicability of the Eighth Amendment to cases of psychological mistreatment). The Supreme Court has recognized that the Eighth Amendment protects individuals from one form of punishment that the Court characterized as psychological: depriving the offender of his citizenship. *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Furman v. Georgia*, 408 U.S. 238, 273 (1972) (Brennan, J., concurring) (citing *Trop*, 356 U.S. at 101, characterizing expatriation as "punishment more primitive than torture"). Justice Brennan argued that it is the enormity of the deprivation involved in expatriation that violates the Eighth Amendment. *Id.*

218. *Tomasi v. France*, 241 Eur. Ct. H.R. (ser. A) at 41-42 (1993).

219. 241 Eur. Ct. H.R. (ser. A) (1993).

220. *Id.* at 34. Tomasi, a French national, was arrested and charged with a number of serious criminal offenses, including murder. *Id.* at 13. He was detained for a total of five years and seven months, after which he was finally acquitted. *Id.* at 34.

221. *Id.* at 32.

222. *Id.* at 41-42. The Commission emphasized that its assessment was dependent on all of the factors in the case, including the length of Tomasi's detention without conviction, the nature and context of the treatment, and its physical and mental effects. *Id.* at 50.

223. *Id.* at 52.

224. *Tyrer v. Isle of Man*, 26 Eur. Ct. H.R. (ser. A) at 17 (1978).

tion to the European Commission alleging an article 3 violation.²²⁵ Under Manx²²⁶ law, the appellant was sentenced to three strokes of a birch.²²⁷ The court held that the punishment that the appellant suffered was neither torture nor inhuman punishment under article 3.²²⁸ The court, however, ruled that it did constitute "degrading punishment," in violation of article 3.²²⁹ The court defined "degrading" as more than just humiliating.²³⁰ The court though did recognize that the mere fact of criminal conviction may be humiliating.²³¹ The punishment specifically may be intended to inflict humiliation on the offender to provide an effective deterrent.²³² The court declared that a punishment that violates article 3, however, cannot be justified solely on the basis of its deterrent effect.²³³ When humiliation is sufficiently severe, it may cross the threshold into a violation of article 3's prohibition against degrading punishment.²³⁴

225. *Id.* at 14. The applicant "pleaded guilty before the local juvenile court to unlawful assault occasioning actual bodily harm to a senior pupil at his school." *Id.* at 6.

226. The term "Manx" refers to "the people of the Isle of Man." WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 825 (3d ed. 1991).

227. *Tyrer*, 26 Eur. Ct. H.R. at 6. Police officers carried out the sentence in a police station. *Id.* at 7. The appellant was required to drop his trousers and underwear. *Id.* Two officers held the appellant while a third administered the blows. *Id.* The birch broke into pieces after the first stroke. *Id.* The birch raised the appellant's skin, but did not cut it. *Id.* The appellant's father and a doctor witnessed the birching. *Id.* The father had to be restrained from attacking one of the police officers. *Id.* The appellant was sore for about 10 days afterwards. *Id.*

228. *Id.* at 14.

229. *Id.* at 17.

230. *Id.* at 15; see also *East African Asians v. United Kingdom*, Eur. Comm'n H.R. Dec. & Rep. 5, 62 (1994) (ruling that "discrimination based on race could, in certain circumstances, of itself amount to degrading treatment within the meaning of Article 3").

231. *Tyrer*, 26 Eur. Ct. H.R. at 15. The court stated that "in most if not all cases this may be one of the effects of judicial punishment, involving as it does unwilling subjection to the demands of the penal system." *Id.*

232. *Id.* The court explained that "what is relevant for the purposes of Article 3 is that he should be humiliated not simply by his conviction but by the execution of the punishment which is imposed on him." *Id.*

233. *Id.* (cautioning that "it is never permissible to have recourse to punishments which are contrary to Article 3, whatever their deterrent effect may be").

234. *Id.* The *Tyrer* court concluded that a determination of whether a punishment is "degrading" under article 3 requires an examination of the facts and circumstances of the individual case. *Id.* This may be vague but it is at least consistent with the court's approach to defining torture in the *Ireland Case*. *Id.*; cf. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 66-67 (1978). The *Tyrer* court also emphasized that this assessment must be conducted in the context of "present-day conditions." 26 Eur. Ct. H.R. (ser. A) at 15. Here, the court took notice of evidence that the Manx birching laws were under legislative review. *Id.* at 16. The court also noted that birching is no longer part of "commonly accepted standards in the penal policy of the member States of the Council of Europe." *Id.*

The Manx Attorney General argued that the punishment was not degrading because it was carried out in private and it preserved the appellant's anonymity.²³⁵ The court rejected this argument, ruling that degradation may be a purely personal phenomenon.²³⁶ The court stated that one of article 3's main purposes is to protect the individual's physical integrity and personal dignity.²³⁷ The violation of article 3 in *Tyrer* was

235. *Tyrer*, 26 Eur. Ct. H.R. at 16.

236. *Id.* (explaining that "it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others"). The court clearly was influenced by the fact that the punishment was administered to the appellant's "bare posterior," and by the "mental anguish" that the appellant suffered as he awaited punishment. *Id.* at 17.

Judge Sir Gerald Fitzmaurice dissented in *Tyrer*, arguing that the offender's punishment could not be considered degrading. *Id.* at 29-30 (Fitzmaurice, J., dissenting). Judge Fitzmaurice, arguing that the majority failed to appreciate the context of the punishment in *Tyrer*, cited *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976). *Handyside* held that sex literature, which would be considered innocuous when distributed to adults, became offensive if distributed to minors. *Tyrer*, 26 Eur. Ct. H.R. at 22 (Fitzmaurice, J., dissenting). Judge Fitzmaurice, using what might be termed a 'reverse-*Handyside*' argument, concluded that the punishment in *Tyrer* might be degrading if inflicted on an adult, but involved no such degradation for a child. *Id.* at 30. Judge Fitzmaurice drew a curious analogy between degradation and condescension when he reasoned that "[p]eople would not call a grown man 'Sonny' or pat him on the head as they would a child or youth, and without causing any resentment." *Id.* at 30 n.8.

Judge Fitzmaurice interpreted the majority's holding to mean that "any judicial corporal punishment meted out to a juvenile is degrading and a breach of article 3." *Id.* at 30. However, Judge Fitzmaurice fundamentally misinterpreted the majority's position. The *Tyrer* holding is not based on the conclusion that birching *per se* is degrading. Rather, the Court concluded that particular aspects of the procedure used to effect the punishment were degrading under article 3. *Id.* at 16-17.

237. *Tyrer*, 26 Eur. Ct. H.R. at 16-17. The *Tyrer* holding stands in marked contrast to the United States Supreme Court's decision in *Ingraham v. Wright*, 430 U.S. 651 (1977). In *Ingraham*, two pupils at a Florida public junior high school filed suit under 42 U.S.C. §§ 1981-1988 for damages and injunctive and declaratory relief against school officials, alleging that the infliction of corporal punishment upon the students pursuant to a Florida statute violated their constitutional rights. *Id.* at 653-57. Justice Powell's majority opinion ruled that the Cruel and Unusual Punishments Clause of the Eighth Amendment does not apply to disciplinary corporal punishment in public schools. *Id.* at 668-71. Furthermore, under the Due Process Clause of the Fourteenth Amendment, the Court ruled that the students were not entitled to notice or a hearing prior to the infliction of corporal punishment. *Id.* at 672-82. The Court reasoned that, if the punishment was excessive, the students could seek civil damages in tort. *Id.* at 676-80. The Court noted that "[t]he schoolchild has little need for the protection of the Eighth Amendment." *Id.* at 670. While recognizing that the students had suffered harsh treatment, the Court stated that "such mistreatment is an aberration." *Id.* at 677.

The United States Court of Appeals for the Fifth Circuit has sought to mitigate the harshness of the Supreme Court's position in *Ingraham*. See *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir.), cert. denied, 115 S. Ct. 70 (1994). In *Doe*, a 15 year-old school-girl was subjected to persistent sexual harassment by one of her teachers, which culminated in sexual intercourse. *Id.* at 445. The fifth circuit ruled that the girl's rights, under the Fourteenth Amendment's Due Process Clause, as well as under 42 U.S.C. § 1983, had been violated. *Id.* at 451-52, 54. The court reasoned that the compulsory nature of school at-

not in the physical element of the birching, but in the psychological degradation inflicted.²³⁸

In *Soering v. United Kingdom*,²³⁹ the European Court ruled that under article 3, a citizen of the Federal Republic of Germany could not be ex-

tendance conferred a duty on school officials to take reasonable steps to protect students from harm. *Id.* at 452-54. The court therefore concluded that a school official may be liable for an injury suffered by a student while attending school if the official failed to take reasonable measures to prevent that injury. *Id.* at 454. See also Robert C. Slim, Comment, *The Special Relationship Doctrine and a School Official's Duty to Protect Students From Harm*, 46 BAYLOR L. REV. 215, 229-30 (1994) (arguing that the applicable standard for determining official liability is deliberate indifference). The *Doe* holding follows a broader line of Supreme Court cases which have imputed civil liability under 42 U.S.C. § 1983 to officials, in spheres other than the public school, on the grounds of deliberate indifference. See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 105-08 (1976) (applying the deliberate indifference theory of liability to imprisonment cases); *Youngberg v. Romeo*, 457 U.S. 307, 314-16 (1982) (applying the theory to cases of medical and psychological institutionalization).

238. 26 Eur. Ct. H.R. at 16-17. The *Tyrer* case has been cited in two recent cases before the European Commission of Human Rights involving the corporal punishment of juveniles in secondary schools in the United Kingdom. The cases of *X & Y v. United Kingdom*, (App. No. 14229/88, Dec. 13, 1990) and *Wendy & Jeremy Costello-Roberts v. United Kingdom* (App. No. 13134/87, Dec. 13, 1990) were both decided on the same day. In both cases, a mother and son brought an article 3 action after a private school inflicted corporal punishment on the son. *X & Y v. United Kingdom*, Eur. Comm'n H.R., Dec. 13, 1990, reprinted in 12 HUM. RTS. L.J. 61 (1991); *Wendy & Jeremy Costello-Roberts v. United Kingdom*, 67 Eur. Comm'n H.R. Dec. & Rep. 216, 221-22 (1991).

In *X & Y*, the applicant alleged that he was caned through his trousers four times, with the teacher taking a running approach prior to striking the blows (although the government denied this). *X & Y*, 12 HUM. RTS. L.J. at 61. A doctor testified that the boy had "four . . . painful wheals across both buttocks, showing heavy bruising and swelling." *Id.* The school inflicted the punishment due to the boy's "wanton vandalism." *Id.* In the *Costello-Roberts* case, the "headmaster called the second applicant into his study and hit him three times on his bottom, through his shorts, with a rubber soled gym shoe." 67 Eur. Comm'n H.R. Dec. & Rep. at 218.

Having exhausted their domestic remedies, the applicants had to establish a cause of action against the United Kingdom government for the actions of an independent private school. *X & Y*, 12 HUM. RTS. L.J. at 62; *Costello-Roberts*, 67 Eur. Comm'n H.R. Dec. & Rep. at 222-23. The Commission found that, under article 1 of the Convention, Contracting States have an obligation to ensure that children within their jurisdiction are not subjected to article 3 violations. *X & Y*, 12 HUM. RTS. L.J. at 62; *Costello-Roberts*, 67 Eur. Comm'n H.R. Dec. & Rep. at 222. Further, the Commission noted that, because independent schools are regulated by statute, government accountability existed. *X & Y*, 12 HUM. RTS. L.J. at 62; *Costello-Roberts*, 67 Eur. Comm'n H.R. Dec. & Rep. at 223.

In both cases, the Commission dismissed the claims of the mothers on grounds that a contract existed between school and parent and that, since the mothers knew, or should have known of, the schools' policies regarding corporal punishment, they were stopped from pursuing an article 3 claim. *X & Y*, 12 HUM. RTS. L.J. at 63; *Costello-Roberts*, 67 Eur. Comm'n H.R. Dec. & Rep. at 223-24. The Commission ruled, however, that the two boys did have grounds to pursue their claims and remanded the two cases for a determination of whether "degrading treatment" had occurred under the *Tyrer* standard. *X & Y*, 12 HUM. RTS. L.J. at 63; *Costello-Roberts*, 67 Eur. Comm'n H.R. Dec. & Rep. at 224.

239. 161 Eur. Ct. H.R. (ser. A) (1989).

tradited to Virginia to face a trial where, if convicted, he could receive capital punishment.²⁴⁰ The decision was not premised on the threat of the death penalty *per se*, but on the prospect that the applicant would have to endure a long wait on death row:²⁴¹ the so-called death row

240. *Id.* at 30-31. Jens Soering, a German national born in 1966, had been living in the United States since he was eleven years old. *Id.* at 11-16. He enrolled at the University of Virginia in 1984 where he developed a relationship with a fellow student, Elizabeth Haysom. *Id.* at 11. Ms. Haysom's parents strongly opposed this relationship. *Id.* The prosecution alleged that Soering and Ms. Haysom devised a plot to kill Ms. Haysom's parents. *Id.* On March 30, 1985, Soering drove by himself to the Haysom's house, where he got involved in an argument with the Haysoms. *Id.* Prosecutors alleged that Soering then attacked them with a knife, slitting their throats and inflicting multiple stab wounds. *Id.* In October 1985, Soering and Ms. Haysom fled to Europe and were arrested in England on April 30, 1986, on charges of check fraud. *Id.* On June 13, 1986, a Virginia grand jury indicted Soering, charging him with the capital murder of the Haysoms. *Id.* at 12. On August 11, 1986, the United States sought extradition of Soering from the United Kingdom. *Id.* Soering contested the extradition proceedings both under English law, and under the European Convention on Human Rights. *Id.* at 12-16. Since article 2(1) clearly permits, and article 3 has not been interpreted to prohibit, the death penalty, Soering was obliged to rest his article 3 claim on the death row phenomenon. European Convention, *supra* note 15, arts. 2(1), 3. In light of facing a potential death sentence if convicted of capital murder in Virginia, Soering alleged that extradition would violate his rights under article 3 of the European Convention because a long wait on death row (the death row phenomenon) would constitute inhuman or degrading treatment. *Soering*, 161 Eur. Ct. H.R. at 30-31.

241. *Soering*, 161 Eur. Ct. H.R. at 30-31. Article 2(1) of the European Convention on Human Rights permits the imposition of the death penalty under certain circumstances. European Convention, *supra* note 15, art. 2(1). In light of article 2(1), Soering did not argue that the death penalty would be a *per se* violation of article 3. *Soering*, 161 Eur. Ct. H.R. at 40. Nevertheless, the court did address the issue of reconciling the death penalty with article 3. *Id.* at 40-41. The court recognized that article 3 could not have been intended as a general prohibition of capital punishment, as that would have rendered article 2(1) meaningless. *Id.* at 40. The court cited Protocol No. 6 to the Convention which states that the death penalty should be abolished in peacetime. *Id.* at 40-41. Recognizing that the Convention must be interpreted in light of the values and practices of modern society, the court also cited an Amnesty International report which pointed to a "virtual consensus in Western European legal systems that the death penalty is, under current circumstances, no longer consistent with regional standards of justice." *Id.* at 40. The court, therefore, viewed article 2(1) as an exception to the general rule under article 3 that capital punishment is unacceptable. *Id.*

There are strong grounds for believing that even if Soering had been extradited, he never would have faced the death penalty. *Id.* at 37. By the court's own admission, Soering could establish four of the five factors listed in the Virginia Code as mitigating circumstances which may be used to avoid imposition of the death penalty. *Id.* These included Soering's age, lack of a criminal history, extreme mental disturbance, and diminished capacity at the time the crime was committed. *Id.* Furthermore, the United Kingdom, which brought extradition proceedings on behalf of the United States, pledged that if extradition was permitted, United States prosecutors would make a submission on behalf of the United Kingdom government to the Virginia court urging it to refrain from issuing a death sentence. *Id.* at 38. Despite these factors, the European Court still found an article 3 violation in a collateral consequence of the, arguably remote, possibility of the imposition

phenomenon.²⁴²

Soering has many striking implications.²⁴³ First, it provided injunctive relief to prevent the occurrence of an article 3 violation.²⁴⁴ Second, it held that extradition proceedings may be halted if they are likely to give rise to an article 3 violation.²⁴⁵ Further, the court ruled that, in an extra-

of the death penalty: the degrading impact of the so-called death row phenomenon. *Id.* at 44-45.

Ironically, the European Court cited the very factors that might have mitigated a death penalty under the Virginia Code as reasons for protecting *Soering* from even the possibility of a stay on death row. *Id.* at 43. After the *Soering* decision, the United States dropped the offense of capital murder from its list of charges against *Soering* and successfully sought *Soering's* extradition. NEWMAN & WEISSBRODT, *supra* note 3, at 477 n.6.

242. See *infra* notes 370-75 and accompanying text (discussing the death row phenomenon in the context of the United States' reservation to its ratification of ICCPR). The European Court characterized the "death row phenomenon" as the highly damaging physical and emotional impact imposed on convicts who experience a lengthy wait in prison between the imposition of a death sentence and its execution. *Soering*, 161 Eur. Ct. H.R. at 32. Features of the phenomenon include the length of detention prior to execution, prison conditions on death row, and the prisoner's age and mental state. *Id.* at 41-43; see ROBERT JOHNSON, CONDEMNED TO DIE: LIFE UNDER SENTENCE OF DEATH (1981) (discussing the damaging psychological effects on the prisoner of a prolonged stay on death row); Robert Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 LAW & PSYCHOLOGY REV. 141, 142, 156 n.30 (1979); see also *infra* note 372 (discussing English and Commonwealth rulings on the death row phenomenon).

243. Richard B. Lillich, Note, *The Soering Case*, 85 AM. J. INT'L L. 128 (1991). Lillich describes the impact of the *Soering* case thus:

Aside from its effect on the future ability of the United States (and many other countries) to obtain the extradition from Council of Europe countries of persons charged with offenses carrying the death penalty, the judgment in *Soering* has implications of a far wider nature for international criminal law, the law of state responsibility, the jurisprudence of the European Convention, and international human rights law in general. . . . Like the proverbial pebble thrown in the pond, *Soering* will cause ripples for some time to come.

Id. at 128. For further discussion of the *Soering* case and its implications, see John Quigley & S. Adele Shank, *Death Row as a Violation of Human Rights: Is It Illegal to Extradite to Virginia?*, 30 VA. J. INT'L L. 241 (1989); Renee E. Boxman, Comment, *The Road to Soering and Beyond: Will the United States Recognize the "Death Row Phenomenon?"*, 14 HOUS. J. INT'L L. 151 (1991); Colin Warbrick, *Coherence and the European Court of Human Rights: The Adjudicative Background To The Soering Case*, 11 MICH. J. INT'L L. 1073 (1989-90); see also Theo Volger, *The Scope of Extradition in the Light of the European Convention on Human Rights*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 663 (Franz Matscher & Herbert Petzold eds., 1988). Volger states that "[n]either Article 3 nor Article 6 [of the European Convention on Human Rights] constitute prohibitions of extradition with a constitutive effect." *Id.* at 669. But Volger also points out that "the speciality of extradition is designed to protect the rights of the requested State, not those of the extradited person." *Id.* at 670-71.

For a discussion of extradition decisions of the UNHRC addressing the death row phenomenon in light of *Soering*, see *infra* notes 274-89 (discussing the cases of *Kindler v. Canada* and *Ng v. Canada*).

244. *Soering*, 161 Eur. Ct. H.R. at 44-45.

245. *Id.*

dition situation, conditions in the country seeking extradition must inevitably be measured by the standards of the Convention.²⁴⁶ Third, it added clarification to the definition of degrading treatment or punishment, which had been established earlier in the *Ireland* and *Tyrer* cases.²⁴⁷ *Soering* suggested that the "minimum level of severity" standard for establishing a threat of a possible future article 3 violation emphasizes the severity of potential harm, with only secondary regard for the likelihood of that harm actually occurring.²⁴⁸

Soering thus stretched the disparity between the Eighth Amendment and the international standard further than prior cases because it provided injunctive relief against a purely psychological harm that was unlikely to occur.²⁴⁹ Furthermore, if the harm did occur, it would do so in a jurisdiction not directly subject to article 3.²⁵⁰

2. Decisions of the United Nations Human Rights Committee

The UNHRC has applied article 7 of ICCPR in response to complaints from individuals under the procedure established under the Optional Protocol.²⁵¹ The language of article 7 suggests ample potential for a broad interpretation that would expand the scope of ICCPR well beyond that of the Eighth Amendment.²⁵² The UNHRC, however, has remained

246. *Id.*; see also *Vilvarajah v. United Kingdom*, 215 Eur. Ct. H.R. (ser. A) (1992) (confirming the *Soering* approach). *Vilvarajah* explained that:

[c]ontracting States have an obligation under Article 3 of the Convention not to send people to countries where there are substantial grounds for believing that they would be in danger of being subjected to treatment proscribed by Article 3 . . . [t]he establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention.

Id. at 47.

247. *Soering*, 161 Eur. Ct. H.R. at 36; cf. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 65 (1978); *Tyrer v. Isle of Man*, 26 Eur. Ct. H.R. (ser. A) at 14 (1978).

248. *Soering*, 161 Eur. Ct. H.R. at 39. But see *Cruz Varas v. Sweden*, 201 Eur. Ct. H.R. (ser. A) (1991), reprinted in 12 HUM. RTS. L.J. 142, 143 (1991). In *Cruz-Varas*, the Swedish government deported three Chilean nationals (a husband, wife, and son) to Chile, after refusing their application for refugee status. *Id.* at 142. In rejecting the petitioner's article 3 claim, the court cited the petitioner's silence over a period of 18 months after his first interrogation by Swedish authorities, continuous changes in his story, and lack of substantiation, all of which impaired the petitioner's credibility. *Id.* at 143. The court also cited the improved political climate in Chile, the voluntary return of many refugees to that country, and the thorough examination of the petitioner's case by the Swedish authorities. *Id.*

249. *Soering*, 161 Eur. Ct. H.R. at 44.

250. *Id.* at 44-45.

251. See *supra* note 16 (discussing the procedure under the Optional Protocol whereby the UNHRC may hear communications from individuals alleging violations of ICCPR).

252. See *infra* notes 290-301 and accompanying text (discussing differences in language between the two provisions and the implications arising therefrom).

relatively restrained in its interpretation of ICCPR.²⁵³ Nevertheless, the UNHRC has found violations of article 7's prohibitions on torture,²⁵⁴ and

253. See *infra* notes 259-73 and accompanying text (describing the procedures of the UNHRC, which may explain its cautious approach toward ICCPR interpretation).

254. Decisions of the UNHRC finding a violation of the article 7 prohibition against torture include:

Minanga v. Zaire, Communication No. 366/1989, *reprinted in* 1 INT'L HUM. RTS. R. 158, 160 (1994) (finding torture where the detainee, a political activist, "remained strapped to the concrete floor of his cell for close to four hours, and . . . was thereafter subjected to acts of torture for several more hours"). The UNHRC ruled in favor of the author of the communication because his photographic evidence raised an inference of torture that the State party failed to refute. *Id.* at 159-60.

Berterretche Acosta v. Uruguay, Communication No. 162/1983, *summarized in* Manfred Nowak, *UN-Human Rights Committee. Survey of decisions given up till July 1989*, 11 HUM. RTS. L.J. 139, 149 (1990) (finding torture under article 7 in the case of a meteorologist who was detained by agents of the Uruguayan military regime, brutalized, and sentenced to 14 years of imprisonment).

Martinez Portorreal v. Dominican Republic, Communication No. 188/1984, *reprinted in* 2 SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL 214, 216, U.N. Doc. CCPR/C/OP/2 (1990) [hereinafter 2 SELECTED DECISIONS] (finding violations of article 7's prohibition against torture in the case of a human rights activist held for 50 hours in a 20 x 5 meter cell along with 125 other detainees, and was denied food and water until the next day).

Herrera Rubio v. Colombia, Communication No. 161/1983, *reprinted in* 2 SELECTED DECISIONS 192, 195 (finding article 7 torture violations in the case of an individual arrested on suspicion of being a member of a guerilla organization, who had been subjected to beatings and hangings. The victim's parents were kidnapped and killed).

Lafuente Penarrieta et al. v. Bolivia, Communication No. 176/1984, *reprinted in* 2 SELECTED DECISIONS 201, 205 (finding article 7 torture violations where the victim was held incommunicado and in solitary confinement for 44 days in a small cell, and subjected to electric shock treatment).

Cariboni v. Uruguay, Communication No. 159/1983, *reprinted in* 2 SELECTED DECISIONS 189, 191 (finding violation of torture prohibition of article 7 in the case of a university professor arrested, held under inhuman conditions and sentenced on the basis of forced confessions to 15 years of imprisonment for the crime of 'subversive association').

Miango Muiyo v. Zaire, Communication No. 194/1985, *reprinted in* 2 SELECTED DECISIONS 219 (finding article 7 violations of the torture prohibition in the case of an individual who was kidnapped by the armed forces of Zaire, and mistreated to such an extent that he died under "dubious circumstances"). The Zaire government's failure to provide any information or clarification of events influenced the UNHRC's decision. *Id.* at 221.

Arzuaga Gilboa v. Uruguay, Communication No. 147/1983, *reprinted in* 2 SELECTED DECISIONS 176, 177-78 (finding violations of the article 7 torture prohibition in the case of a female student subjected to beatings, electric shock treatment, and hanging by the wrists until she lost consciousness).

Conteris v. Uruguay, Communication No. 139/1983, *reprinted in* 2 SELECTED DECISIONS 168, 171 (finding a violation of the article 7 torture prohibition in the case of a journalist and university professor held incommunicado and subjected to hanging by the wrists for ten days, burnings, and immersion of his head in water fouled with blood, vomit, and urine almost to the point of drowning).

Estrella v. Uruguay, Communication No. 74/1980, *reprinted in* 2 SELECTED DECISIONS 93, 97-98 (finding violations of article 7 and article 10(1) in the case of an individual kid-

cruel and inhuman treatment,²⁵⁵ as well as article 10's²⁵⁶ stipulation that

napped at his home, held in military detention without trial in a cage, blindfolded, with his hands tied behind his back, and subjected to 30 days in solitary confinement and seven months without mail or recreation).

See also *Bleier Lewenhoff and Valino de Bleier v. Uruguay*, Communication No. 30/1978, *reprinted in* SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL 109, U.N. Doc. CCPR/C/OP/1 (1982) [hereinafter 1 SELECTED DECISIONS]; *Setelich v. Uruguay*, Communication No. 63/1979, *reprinted in* 1 SELECTED DECISIONS 101; *Grille Motta v. Uruguay*, Communication No. 11/1977, *reprinted in* 1 SELECTED DECISIONS 54; *Hernandez Valentini de Bazzano v. Uruguay*, Communication No. 5/1977, *reprinted in* 1 SELECTED DECISIONS 40.

255. Decisions of the UNHRC finding violations of article 7's prohibition against cruel and inhuman treatment include:

Thomas v. Jamaica, Communication No. 321/1988, *reprinted in* 1 INT'L HUM. RTS. R. 132, 134 (1994) (finding degrading treatment where soldiers and prison wardens assaulted a convicted murderer with rifle butts, causing serious injuries for which he did not receive medical treatment).

Soogrim v. Trinidad and Tobago, Communication No. 362/1989, *reprinted in* 1 INT'L HUM. RTS. R. 169, 172-74 (1994) (finding a violation of article 7 in the case of a convicted murderer who suffered a significant deterioration in his health due to inadequate medical treatment and prison conditions which included being forced to remain naked for two weeks).

Bailey v. Jamaica, Communication No. 334/1988, *reprinted in* 1 INT'L HUM. RTS. R. 139 (1994) (finding violations of article 7's prohibition against cruel and inhuman treatment in the case of a convicted murderer who allegedly received beatings from prison officials using clubs, iron pipes, and batons, after which he received no medical attention).

Francis v. Jamaica, Communication No. 320/1988, *reprinted in* 1 INT'L HUM. RTS. R. 117, 122 (1994) (finding a violation of article 7's prohibition against degrading treatment in the case of a convicted murderer who alleged that prison officials beat him, prodded him with a bayonet, threw urine on him, tossed his food and water on the floor and removed his mattress from his cell).

Linton v. Jamaica, Communication No. 255/1987, *reprinted in* 1 INT'L HUM. RTS. R. 73, 74, 77 (1994) (finding a violation of article 7's prohibition against cruel and inhuman treatment in the case of a prisoner who, while serving a life sentence for murder, suffered a range of physical abuse, including a mock execution and inadequate medical care).

Pratt, Robinson and Morgan v. Jamaica, Communication No. 210/1986, Communication Nos. 223 and 225/1987, *summarized in* Nowak, *supra* note 254, at 150 (holding that a delay of nearly 20 hours from the time complainants were granted a stay of execution to the time complainants were notified and removed from their cells constituted cruel and inhuman treatment in violation of article 7. Complainants were released only 45 minutes prior to the scheduled time of execution).

Martinez Portorreal, *reprinted in* 2 SELECTED DECISIONS 214 (discussed *supra* note 254); *Wight v. Madagascar*, Communication No. 115/1982, *reprinted in* 2 SELECTED DECISIONS, *supra* note 254, at 151. The UNHRC found torture under article 7 in the case of a South African national who made an emergency airplane landing in Madagascar, and was sentenced to five years of imprisonment for flying over Madagascan airspace. *Id.* The victim was kept incommunicado in a solitary room, chained to a bed with minimal clothing and severe rationing of food. *Id.* at 151-52. Madagascar also sentenced a passenger in Wight's plane, Dave Marais, Jr., also a South African national, to five years' imprisonment for the unauthorized violation of Madagascan airspace. *Marais v. Madagascar*, Communication No. 49/1979, *reprinted in* 2 SELECTED DECISIONS, *supra* note 254, at 82. Marais' parents submitted a communication on his behalf to the UNHRC. *Id.* The UNHRC found viola-

detainees be treated with humanity.²⁵⁷ Although the UNHRC generally

tions of article 7 and article 10(1) due to the inhuman conditions in which Madagascar held Marais. *Id.* at 86.

See also *Minanga*, reprinted in 1 INT'L HUM. RTS. R. 158 (1994) (discussed *supra* note 254); *Viana Acosta v. Uruguay*, Communication No. 110/1981, reprinted in 2 SELECTED DECISIONS, *supra* note 254, at 148; *Larrosa Bequio v. Uruguay*, Communication No. 88/1981, reprinted in 2 SELECTED DECISIONS, *supra* note 254, at 118; *Vasilskis v. Uruguay*, Communication No. 80/1980, reprinted in 2 SELECTED DECISIONS, *supra* note 254, at 105; *Massiotti & Baritussio v. Uruguay*, Communication No. 25/1978, reprinted in 1 SELECTED DECISIONS, *supra* note 254, at 136; *Teti Izquierdo v. Uruguay*, Communication No. 73/1980, reprinted in 1 SELECTED DECISIONS, *supra* note 254, at 132; *Setelich*, reprinted in 1 SELECTED DECISIONS, *supra* note 254, at 101; *Soriano de Bouton v. Uruguay*, Communication No. 37/1978, reprinted in 1 SELECTED DECISIONS, *supra* note 254, at 72; *Buffo Carballal v. Uruguay*, Communication No. 33/1978, reprinted in 1 SELECTED DECISIONS, *supra* note 254, at 63; *Weinberger Weisz v. Uruguay*, Communication No. 28/1978, reprinted in 1 SELECTED DECISIONS, *supra* note 254, at 57; *Grille Motta*, reprinted in 1 SELECTED DECISIONS, *supra* note 260, at 54; *Torres Ramirez v. Uruguay*, Communication No. 4/1977, reprinted in 1 SELECTED DECISIONS 1, *supra* note 254, at 49; *Garcia Lanza de Netto et al. v. Uruguay*, Communication No. 8/1977, reprinted in 1 SELECTED DECISIONS, *supra* note 254, at 45.

But see *Vuolanne v. Finland*, Communication No. 265/1987, summarized in *Nowak*, *supra* note 254, at 151 (ruling that the communicant's solitary confinement did not constitute inhuman treatment under articles 7 and 10).

256. ICCPR, *supra* note 1, art. 10. Article 10(1) states that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." *Id.* For a detailed analysis of the meaning and implications of article 10(1), see General comment No. 21 (44) (art. 10) in Annex VI: General Comments Adopted Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, CCPR/C/21/Rev.1 (discussing the aims and meaning of article 10); *Nowak*, *supra* note 14, at 183-89.

257. ICCPR, *supra* note 1, art. 10(1). Decisions of the UNHRC finding violations of article 10(1)'s stipulation that detainees should be treated with humanity include:

Viana Acosta, reprinted in 2 SELECTED DECISIONS, *supra* note 254, at 148 (finding violations of articles 7 and 10(1) due to the inhuman treatment of the communicant while in detention). Acosta, an activist in the opposition political party between 1969 and 1971, was arrested several times on suspicion of subversive activities but was never charged. *Id.* In 1971, Acosta left Uruguay for Argentina, but in February 1974, a joint Uruguayan-Argentinian commando operation allegedly kidnapped Acosta from his Buenos Aires home. *Id.* He alleged that he was tortured and forced to confess to involvement in opposition parties in Uruguay and Argentina. *Id.* He was sent back to Uruguay, placed in detention, tried for "attempting to subvert the Constitution at the level of conspiracy followed by preparatory acts, possession of arms and explosives and use of false identity papers," convicted and sentenced to 14 years imprisonment. *Id.* at 149. Acosta alleged that he was forcibly subjected to "psychiatric experiments," and that he was held incommunicado for 45 days without any medical attention. *Id.* The UNHRC ruled that Acosta had been subjected to inhuman treatment. *Id.* at 150-51. However, the UNHRC rejected Acosta's allegations of torture due to lack of evidentiary support. *Id.* Furthermore, many of the events alleged by Acosta occurred prior to ICCPR's and the Optional Protocol's entry into force in Uruguay. *Id.*

Vasilskis, reprinted in 2 SELECTED DECISIONS, *supra* note 254, at 105 (finding violations of articles 7 and 10(1) in the case of a woman who, although in excellent physical shape at the time of her arrest, suffered extensive physical injuries while in detention). *Vasilskis* was

entertains communications concerning the most egregious and outrageous allegations of physical human rights abuses, the UNHRC also has

imprisoned for eight years for her alleged participation in subversive activities. *Id.* at 106. After years of alleged torture and medical neglect, Vasilskis had suffered diminished vision in both eyes, had lost 40% of the hearing in her left ear, and suffered from Raynaud's disease. *Id.* The UNHRC ruled that Vasilskis' treatment in prison was inhumane and lacked respect for the inherent dignity of the human person. *Id.* at 108.

Larrosa Bequio, reprinted in 2 SELECTED DECISIONS, *supra* note 254, at 118 (recognizing violations of articles 7 and 10(1) in the case of a detainee who lost his hearing in one ear allegedly due to torture, and suffered diminished vision due to malnutrition while in prison). Bequio was not allowed to exercise, read, or write. *Id.* at 119. The UNHRC found that Bequio had not been treated "with humanity and with respect for the inherent dignity of the human person." *Id.* at 121.

Campora Schweizer, reprinted in 2 SELECTED DECISIONS, *supra* note 254, at 90 (finding violation of article 10(1) due to the inhuman prison conditions in which the communicant was held). Campora was arrested in March, 1971, on grounds of "association to break the law." *Id.* In September 1971, he escaped from prison, but was recaptured in April, 1972. *Id.* In May 1974, a judge ordered Campora's provisional release and officials approved his request for permission to leave the country in November, 1974. *Id.* Under emergency national security laws, however, an order of detention was issued against Campora and he remained in prison without having been charged with any crime. *Id.* The prison conditions that prompted UNHRC's finding of an article 10(1) violation included "constant harassment and persecution by the guards," a regime under which Campora was kept in solitary confinement, yet constantly was "listened to and followed by microphones and through peepholes." *Id.* at 92. Campora was deprived of contact with his family, and suffered malnutrition, lack of sunshine, and exercise. *Id.*

See also *Berterretche Acosta*, summarized in Nowak, *supra* note 254, at 149 (discussed *supra* note 254); *Martinez Portorreal*, reprinted in 2 SELECTED DECISIONS, *supra* note 254, at 216 (discussed *supra* note 254); *Herrera Rubio*, reprinted in 2 SELECTED DECISIONS, *supra* note 254, at 192 (discussed *supra* note 254); *Lafuente Penarrieta*, reprinted in 2 SELECTED DECISIONS, *supra* note 254, at 201 (discussed *supra* note 254); *Arzuaga Gilboa*, reprinted in 2 SELECTED DECISIONS, *supra* note 254, at 176 (discussed *supra* note 254); *Conteris*, reprinted in 2 SELECTED DECISIONS, *supra* note 254, at 168 (discussed *supra* note 254); *Wight*, reprinted in 2 SELECTED DECISIONS, *supra* note 254, at 151 (discussed *supra* note 255); *Linton*, reprinted in 1 INT'L HUM. RTS. R. 73 (1994) (discussed *supra* note 255); *Francis*, reprinted in 1 INT'L HUM. RTS. R. 117 (1994) (discussed *supra* note 255); *Bailey*, reprinted in 1 INT'L HUM. RTS. R. 139 (1994) (discussed *supra* note 255); *Soogrim*, reprinted in 1 INT'L HUM. RTS. R. 169 (1994) (discussed *supra* note 255); *Thomas*, reprinted in 1 INT'L HUM. RTS. R. 132 (1994) (discussed *supra* note 255); *Minanga*, reprinted in 1 INT'L HUM. RTS. R. 158 (1994) (discussed *supra* note 254); *Estrella*, reprinted in 2 SELECTED DECISIONS, *supra* note 254, at 93 (discussed *supra* note 254); *Massiotti and Baritusio*, reprinted in 1 SELECTED DECISIONS, *supra* note 254, at 136; *Teti Izquierdo*, reprinted in 1 SELECTED DECISIONS, *supra* note 254, at 132; *Bleier Lewenhoff*, reprinted in 1 SELECTED DECISIONS, *supra* note 254, at 109; *Setelich*, reprinted in 1 SELECTED DECISIONS, *supra* note 254, at 101; *Soriano de Bouton*, reprinted in 1 SELECTED DECISIONS, *supra* note 254, at 72; *Buffo Carballal*, reprinted in 1 SELECTED DECISIONS, *supra* note 254, at 63; *Weinberger Weisz*, reprinted in 1 SELECTED DECISIONS, *supra* note 254, at 57; *Grille Motta*, reprinted in 1 SELECTED DECISIONS, *supra* note 254, at 54; *Torres Ramirez*, reprinted in 1 SELECTED DECISIONS, *supra* note 254, at 49; *Garcia Lanza de Netto*, reprinted in 1 SELECTED DECISIONS, *supra* note 254, at 45; *Hernandez Valentini de Bazzano*, reprinted in 1 SELECTED DECISIONS, *supra* note 254, at 40.

recognized more indirect, psychological forms of abuse.²⁵⁸

a. Procedural Defects of the UNHRC

The UNHRC procedure has failed to provide an effective source of relief for those claiming violation of their rights under article 7 and article 10.²⁵⁹ There are many reasons for this.²⁶⁰ First, relatively few countries

258. See *Almeida de Quinteros v. Uruguay*, Communication No. 107/1981, reprinted in 2 SELECTED DECISIONS, *supra* note 254, at 138-43 (recognizing violations of articles 7, 9, and 10(1) in the case of a daughter held in military detention and subjected to torture and of her mother, who endured the psychological anguish of not knowing her daughter's fate). Maria del Carmen Almeida de Quinteros submitted a communication to UNHRC on her own and her daughter, Elena Quinteros Almeida's, behalf. *Id.* at 139. Elena was held at a military unit where all detainees were addressed only by an identification number, blindfolded, with their hands tied behind their backs, and systematically tortured. *Id.* Another inmate corroborated allegations of Elena's torture. *Id.* Maria alleged that she was a victim of violations of article 7, due to the psychological torture of not knowing the fate of her daughter. *Id.* at 140. The UNHRC recognized that Maria was the victim of an article 7 violation:

The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author [Maria] has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7.

Id. at 142. The UNHRC concluded that the Uruguay authorities must take responsibility for Elena's disappearance, and that Uruguay was obligated to take immediate and effective steps to secure her release. *Id.* at 142-43.

259. See Quigley, *supra* note 1, at 64. Professor Quigley summarizes the deficiencies of the UNHRC procedures thus:

The enforcement mechanisms to which the United States is subject have little bite. As a party to the Covenant, the United States must submit a periodic report to the Human Rights Committee; but the Committee has few investigatory powers and has been reluctant to take other affirmative steps toward more effective monitoring.

Id. at 62.

Perhaps recognizing the difficulties that the United Nations faces in taking a member state to task based on individual complaints, the United Nations Commission on Human Rights developed a thematic approach to human rights abuses focusing on categories of abuse rather than specifically on the countries that are allegedly responsible for such abuse. See NEWMAN & WEISSBRODT, *supra* note 3, at 139-40; see also David Weissbrodt, *The Three "Theme" Special Rapporteurs of the UN Commission on Human Rights*, 80 AM. J. INT'L L. 685 (1986). Among its various "thematic" mechanisms, the United Nations Commission on Human Rights established a Working Group on Enforced or Involuntary Disappearances in 1980, a Special Rapporteur on Summary or Arbitrary Executions in 1982, and a Special Rapporteur on Torture in 1985. NEWMAN & WEISSBRODT, *supra* note 3, at 139. According to Newman and Weissbrodt, "(e)ach of these mechanisms has the authority to receive information on human rights problems within its area of concern and to take 'effective action' in trying to urge governments to resolve the problems." *Id.*

260. NEWMAN & WEISSBRODT, *supra* note 3, at 71-73. Under the United Nations' procedures, there is a requirement that prior to bringing a complaint to the UNHRC, the complainant first must exhaust any available remedies in domestic court. Optional Protocol, *supra* note 1, arts. 2, 5(2)(b). Many complaints brought before the Committee fail this

allow an individual communication to be brought before the UNHRC.²⁶¹ This results from the requirement that the "target country" of an individual communication be a State party to the Optional Protocol, and consent to the individual communication process.²⁶²

Second, the UNHRC only meets three times per year for three weeks at a time.²⁶³ At each meeting, the UNHRC considers reports from States parties detailing their human rights record and the steps taken to implement the terms of ICCPR.²⁶⁴ The UNHRC considers individual communications at closed meetings where the State party implicated in the communication is represented.²⁶⁵ The individual responsible for the communication, however, is not permitted to attend.²⁶⁶ Although the UNHRC's deliberations are confidential, it publishes its final decisions.²⁶⁷

Third, the UNHRC's procedures are extremely slow, and no mechanism for acceleration in response to emergency communications exists.²⁶⁸ The lethargic nature of the process, combined with the requirement that the complainant exhaust all domestic remedies, effectively eliminates the possibility of obtaining injunctive relief.²⁶⁹ Fourth, many individual com-

threshold step, and thus the Committee never considers the substance of those complaints. NEWMAN & WEISSBRODT, *supra* note 3, at 9-10.

261. NEWMAN & WEISSBRODT, *supra* note 3, at Supp. 9. As of October 1993, there were 124 States parties to ICCPR, of which 68 states were parties to the Optional Protocol. *Id.* Of those, 43 states had made the declaration recognizing the competence of the UNHRC to consider communications relating to inter-state disputes. *Id.*

262. See *supra* note 16 (discussing the procedure under the Optional Protocol whereby the UNHRC may hear communications from individuals alleging violations of ICCPR).

263. See *supra* note 16 (discussing procedural aspects of the UNHRC).

264. NEWMAN & WEISSBRODT, *supra* note 3, at 71-73.

265. Optional Protocol, *supra* note 1, art. 5(3). "Consideration of communications under the Optional Protocol takes place in closed meetings (art. 5(3) of the Optional Protocol). All documents pertaining to the work of the Committee under the Optional Protocol (submissions from the parties and other working documents of the Committee) are confidential." NEWMAN & WEISSBRODT, *supra* note 3, at 71.

266. NEWMAN & WEISSBRODT, *supra* note 3, at 71.

267. *Id.*

268. *Id.* at 72. Newman and Weissbrodt explain that:

Since the Committee, which meets three times a year, must allow both the author and the State party sufficient time to prepare their submissions, a decision on admissibility can only be taken between six months and a year after the initial submission; views under Article 5(4) may follow one year later. The entire procedure normally may be completed within two to three years. The Committee tries to deal expeditiously with all communications.

Id.

269. *Id.* The lack of availability of injunctive or even prompt post-injury relief means that the individual communication process of the UNHRC is, in reality, a mechanism for applying pressure on a government to reform its policies and behavior rather than a genuine source of a remedy for individual victims.

munications also are rejected on procedural grounds, and the UNHRC never considers the substance of their allegations.²⁷⁰ Furthermore, States parties who are the subject of UNHRC communications often fail to respond to allegations that they have violated ICCPR.²⁷¹ As a result, decisions of the UNHRC often read as exhortations to, or admonishments of, the State party that the communication implicates for more information or an explanation.²⁷²

Despite providing a useful source of interpretation of the article 7 prohibitions of torture and cruel and inhuman treatment, decisions of the UNHRC generally represent the clearly established core, rather than the controversial margins, of article 7 protection.²⁷³

b. The UNHRC's Treatment of Extradition Cases

The UNHRC recently has addressed the issue raised in *Soering* of whether extradition of an individual to a country whose criminal justice system may violate a human rights treaty is itself a violation of ICCPR.²⁷⁴ The UNHRC first addressed this issue in *Kindler v. Canada*.²⁷⁵ Joseph

270. Optional Protocol, *supra* note 1; see also NEWMAN & WEISSBRODT, *supra* note 3, at 72-74. Reasons for the Committee's rejection of individual communications on procedural grounds are:

a) failure of claims due to *ratione temporis* (i.e. the State party that is the subject of the communication had not ratified the Optional Protocol at the time of the alleged violation). *Id.* at 73; see also *M.T. v. Spain*, Communication No. 310/1988, *reprinted in* 12 HUM. RTS. L.J. 299-300 (1991) (declaring petitioner's claim of torture inadmissible on the ground of *ratione temporis*, since Spain had not yet ratified the Optional Protocol when the alleged incident occurred).

b) standing problems: under article 1, the individual communicant must actually be a victim of the alleged violation. NEWMAN & WEISSBRODT, *supra* note 3, at 73.

c) failure of the communicant to substantiate his allegations, or to show that he is a victim. *Id.* at 73.

d) failure to exhaust domestic remedies under articles 2 and 5(2)(b). *Id.* at 74.

271. See, e.g., *Miango Miuyo*, *reprinted in* 2 SELECTED DECISIONS, *supra* note 254, at 219; *Marais*, *reprinted in* 2 SELECTED DECISIONS, *supra* note 254, at 82; *Almeida de Quinteros*, *reprinted in* 2 SELECTED DECISIONS, *supra* note 254, at 138.

In other cases, the implicated State party provided only a perfunctory response that the UNHRC deemed unsatisfactory. See, e.g., *Buffo Carballal*, *reprinted in* 1 SELECTED DECISIONS, *supra* note 254, at 63; *Weinberger Weisz*, *reprinted in* 1 SELECTED DECISIONS, *supra* note 254, at 57; *Soriano de Bouton*, *reprinted in* 1 SELECTED DECISIONS, *supra* note 254, at 72.

272. See *supra* note 271 (listing cases where a State party implicated by a communication to the UNHRC has either failed to respond or has responded in a perfunctory and unsatisfactory manner).

273. See *supra* notes 254-55, 257-58 and accompanying text (providing a catalog of decisions of the UNHRC under the ICCPR and the Optional Protocol).

274. See *supra* notes 239-50 and accompanying text (discussing the European Court of Human Rights' decision in *Soering*).

275. Communication No. 470/1991, *reprinted in* 14 HUM. RTS. L.J. 307 (1993).

Kindler was convicted of first-degree murder and kidnapping in Pennsylvania, and the jury recommended a death sentence.²⁷⁶ Prior to sentencing, Kindler escaped from custody and fled to Canada.²⁷⁷ While extradition proceedings were pending, Kindler petitioned the UNHRC, arguing that his extradition to face the death penalty would violate ICCPR.²⁷⁸ Specifically, Kindler reasoned not only that the death penalty constituted *per se* cruel and inhuman treatment or punishment, but also that conditions on Pennsylvania's death row were cruel, inhuman, and degrading.²⁷⁹ In a decision heavily influenced by the European Court of Human Rights' approach in *Soering*, the UNHRC ruled that Canada had an obligation under ICCPR to weigh the United States' potential violations of Kindler's rights before acceding to the extradition request.²⁸⁰ The UNHRC established a "real risk" test of potential violation: whether Kindler faced a "real risk" that the United States would violate his ICCPR rights.²⁸¹ The UNHRC rejected Kindler's claim, however, recognizing that ICCPR does not prohibit the death penalty²⁸² and that Kindler had failed to substantiate his allegation that conditions on

276. *Id.* at 308.

277. *Id.*

278. *Id.*

279. *Id.* Canada responded that, while it was answerable for its own violations of ICCPR, it could not be held accountable for the United States' violations. *See id.*

280. *Id.* at 309. ICCPR obligates States parties to guarantee the rights of all individuals within their jurisdiction. *Id.* (citing ICCPR, *supra* note 1, art. 2). However, ICCPR does not impose an express requirement on States parties to "guarantee the rights of persons within another jurisdiction." *Id.* But the UNHRC reasoned that "a State party's duty under (ICCPR) would be negated by the handing over of a person to another State (whether a State party to the Covenant or not) where treatment contrary to the Covenant is certain or is the very purpose of the handing over." *Id.* The UNHRC continued:

a State party would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on.

Id.

281. *Id.* at 313. The UNHRC stated that "[i]f a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant." *Id.*

282. ICCPR, *supra* note 1, art. 6(2); *see also infra* notes 368 and accompanying text (explaining that ICCPR restricts, rather than prohibits, application of the death penalty). The UNHRC stated that "prolonged judicial proceedings do not *per se* constitute cruel, inhuman and degrading treatment, even if they can be a source of mental strain for the convicted persons." *Kindler*, reprinted in 14 HUMAN RIGHTS L.J. 307, 309, 314 (1993) (quoting UNHRC views on communications Nos. 210/1986 and 225/1987 (*Pratt and Morgan v. Jamaica*) adopted on 6 April 1989, para. 13.6). The UNHRC emphasized that no article 7 violation occurs when a "convicted person is merely availing himself of appellate remedies." *Id.* at 314.

Pennsylvania's death row violated ICCPR.²⁸³

The UNHRC returned to the extradition issue later in 1993 in the case of *Ng v. Canada*.²⁸⁴ Authorities accused Charles Chitat Ng of committing twelve murders in California.²⁸⁵ When the United States sought Ng's extradition from Canada, Ng petitioned the UNHRC.²⁸⁶ Canada extradited Ng to California, however, prior to the UNHRC's decision.²⁸⁷ The UNHRC ruled that California's method of execution, gas asphyxiation, constituted cruel and inhuman treatment, and therefore that Ng's extradition violated ICCPR.²⁸⁸

These decisions demonstrate that the UNHRC interprets ICCPR to prohibit extradition to a jurisdiction where the extraditee faces a "real risk" that his rights under ICCPR will be violated. This position is consonant with the European Court's interpretation of the European Convention in *Soering*.²⁸⁹

283. *Id.* at 313-14. In addition, Kindler failed to provide adequate evidence of the potential psychological effect upon him from confinement on Pennsylvania's death row. *Id.* at 314. The UNHRC noted that the "age and mental state of the offender" influenced the decision in *Soering*. *Id.*

See also *Cox v. Canada*, Communication No. 539/1993, reprinted in 15 HUM. RTS. L.J. 410 (1994) (ruling that extradition of an accused murderer to the United States to face possible imposition of the death penalty did not violate ICCPR). Keith Cox faced extradition from Canada to the United States to face two charges of first-degree murder in Pennsylvania. *Id.* at 410. The UNHRC rejected Cox's petition on grounds that his submissions to the Committee failed to establish that he faced a "real risk" of suffering a violation of his rights under ICCPR if extradited to Pennsylvania. *Id.* at 416-17.

284. Communication No. 469/1991, reprinted in 15 HUM. RTS. L.J. 149 (1994).

285. *Id.* at 149.

286. *Id.*

287. *Id.*

288. *Id.* at 157. The UNHRC ruled that California's use of execution by gas asphyxiation violated article 7 because it failed to ensure that a death sentence would be "'carried out in such a way as to cause the least possible physical and mental suffering.'" *Id.* (quoting UNHRC's General Comment 20[44] on article 7 of ICCPR (CCPR/C/21/Add.3, paragraph 6)). Since Ng's extradition to the United States had occurred already, the UNHRC requested Canada to make representations to the United States to avoid the imposition of the death penalty and exhorted Canada not to let this situation arise again in the future. *Id.*

289. See *Ng*, reprinted in 15 HUM. RTS. L.J. 149, 157 (1994) (referencing the European Court of Human Rights' approach in *Soering*). The UNHRC stated that:

In determining whether, in a particular case, the imposition of capital punishment constitutes a violation of article 7, the Committee will have regard to the relevant personal factors regarding the author [i.e., the petitioner], the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent.

Id.; cf. *supra* notes 239-50 and accompanying text (discussing the European Court of Human Rights' decision in *Soering*). But see *Pak*, *supra* note 167, at 276-77 (arguing that Canada violated its obligations under ICCPR by extraditing Ng and Kindler to the United States).

II. INTEGRATING THE INTERNATIONAL STANDARD INTO AMERICAN JURISPRUDENCE

A. *Comparing the Language of the Eighth Amendment and Article 7*

The differences in the respective language of article 7 and the Eighth Amendment provide a clear basis for establishing divergent interpretations of the two provisions. First, article 7 specifically prohibits "torture," while the Eighth Amendment makes no specific reference to the concept of torture.²⁹⁰ Second, article 7 refers to "treatment or punishment," while the Eighth Amendment refers to only punishment.²⁹¹ Third, article 7, unlike the Eighth Amendment, uses the term, "degrading."²⁹² Fourth, article 7, unlike the Eighth Amendment, uses the term, "inhuman."²⁹³

The phrase "cruel and unusual punishments" has been described as a "three-word term of art" whereby the words "cruel" and "unusual" operate interdependently rather than independently of each other.²⁹⁴ The Eighth Amendment, unlike article 7, contains the word "unusual," a term that has given rise to considerable ambiguity and interpretive debate in Supreme Court opinions.²⁹⁵ Justice White and Justice Scalia engaged in a debate in *Harmelin* over the meaning of the term "unusual" in the Eighth Amendment.²⁹⁶ Justice Scalia argued that the term has never carried any technical or legal meaning,²⁹⁷ and therefore concluded that any legislatively-authorized punishment must not be "unusual" as long as it is "regu-

290. Compare ICCPR, *supra* note 1, art. 7 (stating that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment") with U.S. CONST. amend. VIII (prohibiting only "cruel and unusual punishments"); see also NOWAK, *supra* note 14, at 126-34 (analyzing the significance of the language of article 7).

291. Compare ICCPR, *supra* note 1, art. 7 with U.S. CONST. amend. VIII. See also NOWAK, *supra* note 14, at 126-34 (analyzing the significance of the language of article 7).

292. Compare ICCPR, *supra* note 1, art. 7 with U.S. CONST. amend. VIII. See also NOWAK, *supra* note 14, at 126-34 (analyzing the significance of the language of article 7).

293. Compare ICCPR, *supra* note 1, art. 7 with U.S. CONST. amend. VIII. See also NOWAK, *supra* note 14, at 126-34 (analyzing the significance of the language of article 7).

294. Ogilvie, *supra* note 51, at 259 n.2 (quoting JAMES J. GOBERT & NEAL P. COHEN, RIGHTS OF PRISONERS § 11.02, at 314 (1981)); see also John E. Theuman, Annotation, *Conditions of Confinement as Constituting Cruel and Unusual Punishment in Violation of Federal Constitution's Eighth Amendment*, 115 L. Ed. 2d 1151 (1994). Theuman describes four categories of punishment that are cruel and unusual under the Supreme Court's interpretation of the Eighth Amendment: punishments that are (1) inherently cruel or severe, (2) excessive, disproportionate, or unnecessary, (3) unacceptable to society, or (4) inflicted arbitrarily. *Id.* at 1154.

295. U.S. CONST. amend. VIII.

296. *Harmelin v. Michigan*, 501 U.S. 957, 975-88 (1990) (Scalia, J.); 1009-18 (White, J., dissenting).

297. See *id.* at 976 (Scalia, J., dissenting). Justice Scalia referred to Webster's definition of "unusual" as "'such as [does not] occur in ordinary practice'" or "'[s]uch as is [not] in common use.'" *Id.* (quoting WEBSTER'S SECOND INTERNATIONAL DICTIONARY 2807 (1954)).

larly or customarily employed.”²⁹⁸ Justice White accused Justice Scalia of suggesting that legislative enactment of a form of punishment would render it *per se* “usual.”²⁹⁹ He castigated Justice Scalia for propagating a definition of “unusual” that would render the term meaningless, thereby frustrating constitutional judicial review of legislation.³⁰⁰

The linguistic contrast between article 7 and the Eighth Amendment might best be summarized thus: the Eighth Amendment contains vague language that has been interpreted with considerable specificity, whereas article 7 contains more specific language that still awaits a correspondingly specific interpretation.³⁰¹

298. *See id.* (Scalia, J.) (concluding that “[the Cruel and Unusual Punishments Clause] disables the Legislature from authorizing particular forms or ‘modes’ of punishment — specifically, cruel methods of punishment that are not regularly or customarily employed”). The Supreme Court debate over Eighth Amendment interpretation is submerged in a wider debate among members of the Court as to the appropriate degree of deference that the judicial branch should afford its legislative counterpart. This debate sometimes has hinged on whether it is possible to drive a wedge between a state statute and the Eighth Amendment by arguing that the statute is “unusual” under the international standard. *See* *Stanford v. Kentucky*, 492 U.S. 361, 384-91 (1989) (Brennan, J., dissenting) (using statistical data to argue that the execution of minors is “unusual” both in a domestic and international context); *Furman v. Georgia*, 408 U.S. 238, 268 (1972) (Brennan, J., concurring) (arguing that the Framers intended the Eighth Amendment to be a “‘constitutional check’” on the legislative branch). Justice Brennan cautioned that “‘when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives’ . . . We know that the Framers did not envision, ‘so narrow a role for this basic guaranty of human rights.’” *Id.* (citing Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1782 (1970)).

299. *Harmelin*, 501 U.S. at 1016-17 (White, J., dissenting).

300. *Id.* at 1016-17. Justice White pointed out that “contrary to Justice Scalia’s suggestion, . . . the fact that a punishment has been legislatively mandated does not automatically render it ‘legal’ or ‘usual’ in the constitutional sense. Indeed, as noted above, if this were the case, then the prohibition against cruel and unusual punishments would be devoid of any meaning.” *Id.* Justice White continued, “the suggestion that a legislatively mandated punishment is necessarily ‘legal’ is the antithesis of the principles established in *Marbury v. Madison*, for ‘[i]t is emphatically the province and duty of the judicial department to say what the law is,’ and to determine whether a legislative enactment is consistent with the Constitution.” *Id.* at 1017 (citation omitted).

301. *See* Theuman, *supra* note 294, at 1155 (observing that “[a]s a general matter, the Supreme Court has held that conditions of confinement may not be considered cruel and unusual punishment unless they are shown to deprive prisoners of some identifiable human need — such as food, warmth, or exercise — and violate the minimal civilized measure of life’s necessities”). *But see* Bernard, *supra* note 17, at 784-85. Bernard explains the difficulty of defining ‘humane treatment’ under international law thus:

If “humane treatment” means freedom from torture, then there is already near-universal recognition of a binding norm of international law. However, once the definition of “humane treatment” is expanded to include a prohibition on “cruel, inhuman and degrading treatment,” the status as customary international law is less clear. And if “humane treatment” includes the right to a library, a single cell, or dental services, which are among the numerous Standard Minimum Rules [for

B. *The Applicability of International Law in the United States*

There are three broad theories that provide a basis for the incorporation of international law into United States domestic law.³⁰² These three theories may be characterized as direct enforcement, enforcement as customary law, and enforcement by constructive interpretation.

1. *Direct Enforcement*³⁰³

Under the Supremacy Clause of the United States Constitution,³⁰⁴ any treaty, once ratified, becomes part of the supreme law of the United States, of equal status to a federal statute, and prevalent over state law.³⁰⁵ A treaty is ratified when the President signs it on the Advice and Consent of two-thirds of the United States Senate.³⁰⁶ Like a federal statute, an

the Treatment of Prisoners], then it most certainly has not been generally accepted as a binding norm.

Id. at 786 (footnotes omitted). Bernard criticizes the drafters of article 7 for failing to "define or explain the phrase cruel, inhuman or degrading treatment." *Id.* at 768.

302. Kathryn Burke et al., *Application of International Human Rights Law in State and Federal Courts*, 18 TEX. INT'L L.J. 291 (1983); see also Richard B. Bilder, *The Status of International Human Rights Law: An Overview*, in INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE: THE ROLES OF THE UNITED NATIONS, THE PRIVATE SECTOR, THE GOVERNMENT, AND THEIR LAWYERS 1 (James C. Tuttle ed., 1978) [hereinafter INTERNATIONAL HUMAN RIGHTS LAW] (discussing the sources and basic enforcement alternatives of international human rights law); Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367 (1985) (describing and evaluating the status of international human rights law in the United States).

303. Burke, *supra* note 302, at 295-314 (discussing direct enforcement of international human rights treaty law).

304. U.S. CONST. art. VI, § 2, cl. 2.

305. U.S. CONST. art. VI, § 2, cl. 2; see also Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, T.S. No. 58 (1980), reprinted in 8 I.L.M. 679-713 (1969), entered into force Jan. 27, 1980, art. 2 [hereinafter Vienna Convention] (defining the concept of a treaty); *B. Altman & Co. v. United States*, 224 U.S. 583, 600 (1912) (defining a treaty as "a compact made between two or more independent nations with a view to the public welfare" (quoting 2 BOUVIER'S DICTIONARY 1136)). If a treaty conflicts with state law, the treaty (like federal law) prevails. *Missouri v. Holland*, 252 U.S. 416, 432 (1920) (holding that enforcement of treaty protecting migratory birds did not infringe on sovereignty reserved to the states under the Tenth Amendment).

306. U.S. CONST. art. II, § 2, cl. 2; see also David Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35, 63-72 (1978) (criticizing President Jimmy Carter's reservations to human rights covenants); Detlev F. Vagts, *The Exclusive Treaty Power Revisited*, 89 AM. J. INT'L L. 40 (1995) (explaining the respective roles of the executive and legislative branches in the treaty ratification process); Malvina Halberstam, *A Treaty Is A Treaty Is A Treaty*, 33 VA. J. INT'L L. 51 (1992) (criticizing the so-called 'dual treaty rule' and arguing for a single, common approach to treaty interpretation under both domestic and international law). Halberstam characterizes the dual treaty rule thus:

The . . . dual treaty rule . . . is: that there are two treaties, one as domestically interpreted by reference to U.S. legislative history, and one as interpreted under international law by reference to the negotiating history; that under Article VI it is the treaty as domestically interpreted, or even more narrowly, as the Senate

international treaty may not violate any provision of the United States Constitution.³⁰⁷ If a conflict arises between a federal statute and a ratified treaty, then the more recently enacted instrument prevails.³⁰⁸

2. Customary Law Enforcement

International law may be enforced in the United States based on its status as customary law.³⁰⁹ Customary international law is defined as "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."³¹⁰ In *Filar-tiga v. Pena-Irala*,³¹¹ the United States Court of Appeals for the Second

understood it, that is the supreme law of the land; and that the President is required to implement the treaty as so understood, regardless of whether that would impose greater obligations than necessary under international law or require the United States to breach its obligations internationally. Such a rule is not, has never been, and should not be, the law. The rule is and should continue to be that there is only one treaty. If the United States is bound internationally it is bound domestically unless the treaty is unconstitutional or Congress enacts superseding legislation. If the United States is not bound internationally, it is not bound domestically, at least by the exercise of the treaty power.

Id. at 67 (footnote omitted).

307. U.S. CONST. art. VI, § 2, cl. 2; see also Burke, *supra* note 302, at 295-314 (discussing direct enforcement of international human rights treaty law in the United States).

308. Reid v. Covert, 354 U.S. 1, 18 n.34 (1955); see also Burke, *supra* note 302, at 295-96 (explaining the priority given to the more recently enacted instrument).

309. Burke, *supra* note 302, at 315-22 (discussing enforcement of international human rights law as customary law).

310. The Paquete Habana, 175 U.S. 677, 700 (1900); see Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59 (1990) (defining the concept of customary international law and describing its origins). Paust identifies "several constitutional bases" mandating the incorporation of customary international law into domestic United States law. *Id.* at 77-91; see also Lillich, *supra* note 302, at 393-408 (discussing the status of customary international law in the United States); see also Theodor Meron, *On A Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 1 (1986) (documenting efforts to establish a hierarchy of norms in international human rights law). Meron explains that the establishment of a hierarchy of such norms is highly problematic, but notes that the right of freedom from torture is one of the few rights whose place at the top of such a hierarchy is unquestionable. *Id.* at 4. Meron argues that four rights represent an "irreducible core" of fundamental rights. *Id.* at 11. Those include "the right to life and the prohibitions of slavery, torture and retroactive penal measures." *Id.*; see also David Catania, Note, *The Universal Declaration of Human Rights and Sodomy Laws: A Federal Common Law Right to Privacy for Homosexuals Based on Customary International Law*, 31 AM. CRIM. L. REV. 289, 323-25 (1994) (arguing that customary international law mandates the recognition of a federal common law right to privacy for homosexual activity).

311. 630 F.2d 876 (2d Cir. 1980). Dr. Joel Filartiga and his daughter, Dolly, citizens of Paraguay, brought an action in the Eastern District of New York against Americo Norberto Pena-Irala, erstwhile Inspector General for police in Asuncion, Paraguay, for the wrongful death of Dr. Filartiga's son, Joelito. *Id.* at 878. The Filartigas alleged that on

Circuit ruled that torture violates customary international law and, therefore, jurisdiction could be established in the United States under the Alien Tort Claims Act³¹² to hear a claim that Paraguayan officials tortured a Paraguayan national in Paraguay.³¹³

March 29, 1976, Joelito was kidnapped, tortured, and murdered by Pena-Irala in retaliation for Dr. Filartiga's political opposition to the regime of President Alfredo Stroessner. *Id.* By 1978, Dr. Filartiga, Dolly Filartiga, and Pena-Irala all lived in the United States, where Dolly Filartiga served Pena-Irala with a summons and a civil complaint. *Id.* at 878-79. The complaint sought compensatory and punitive damages in the amount of 10 million dollars and also sought to enjoin Pena-Irala's deportation to Paraguay, so the Filartigas could proceed with their suit against him in the United States. *Id.* at 879. According to Judge Kaufman's opinion:

The cause of action is stated as arising under "wrongful death statutes; the U.N. Charter; the Universal Declaration on Human Rights; the U.N. Declaration Against Torture; the American Declaration of the Rights and Duties of Man; and other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations," as well as 28 U.S.C. § 1350 [the Alien Tort Claims Act], Article II, sec. 2 and the Supremacy Clause of the U.S. Constitution.

Id. Although the court recognized that the Alien Tort Claims Act enabled the Filartigas to overcome the jurisdictional obstacles to bringing their claim, United States authorities deported Pena-Irala to Paraguay on May 22, 1979. *Id.* at 880.

For a more detailed appraisal of the *Filartiga* case, see Karen E. Holt, *Filartiga v. Pena-Irala After Ten Years: Major Breakthrough or Legal Oddity?*, GA. J. INT'L & COMP. L. 543 (1990) (analyzing the impact of the *Filartiga* decision on the application of international human rights law in the United States).

312. 28 U.S.C. § 1350 (1976).

313. *Filartiga*, 630 F.2d at 889; see Holt, *supra* note 311, at 568 (evaluating the impact of the *Filartiga* decision and concluding that, in addition to its contribution to the establishment of an individual remedy under United States law, *Filartiga* also bore the "psychological and academic value" of a "moral and even political victory for plaintiffs, both domestically and internationally").

But see *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (dismissing an action brought under the Alien Tort Claims Act, 28 U.S.C. § 1350). In *Tel-Oren*, a group largely comprising Israeli citizens sued the Libyan Arab Republic, the Palestinian Liberation Organization, the Palestine Information Office and other Palestine-affiliated groups, for compensatory and punitive damages arising from an armed attack on a civilian bus in Israel in March 1978. *Id.* at 775. The plaintiffs were either survivors of, or had lost relatives in, the attack. *Id.*

All three members of the three-judge panel of the D.C. Circuit Court of Appeals concurred in the result, but for different reasons. *Id.* at 775. Judge Bork wrote that although § 1350 provides a grant of jurisdiction, the plaintiffs failed to establish a private right of action. *Id.* at 811-19 (Bork, J., concurring). Judge Robb dismissed the action on the grounds that the dispute involved international political action and, therefore, was not justiciable under the political question doctrine. *Id.* at 823-27. (Robb, J., concurring). The third member of the panel, Judge Edwards, interpreted § 1350 in a manner consistent with *Filartiga*. *Id.* at 781 (Edwards, J., concurring). Judge Edwards argued that § 1350 does provide a cause of action for certain categories of torts "committed in violation of the law of nations." *Id.* at 779. Therefore, the plaintiffs should not be required to establish a private right of action independent of § 1350. *Id.* However, Judge Edwards recognized that "[t]he *Filartiga* formulation is not flawless" because "it places an awesome duty on federal

3. Enforcement by Constructive Interpretation

International law may be used as a persuasive, interpretive guide in defining rights under domestic state and federal law.³¹⁴

4. Applying the Three Enforcement Theories to the Incorporation of Article 7 Into United States Domestic Law

Article 7 of ICCPR should be directly enforceable in the United States under the first, or direct enforcement, theory.³¹⁵ But assuming, *arguendo*, that article 7 is not directly enforceable, the power of the article 7 prohibitions as both customary international law and as an interpretive tool under the second and third theories remains considerable.³¹⁶ Furthermore, the theory of *jus cogens* might compel the application of international standards regarding torture.³¹⁷ The doctrine of self-execution, however, poses a potential obstacle to direct enforcement of international

district courts to derive from an amorphous entity—i.e., the ‘law of nations’—standards of liability applicable in concrete situations.” *Id.* at 781. Since the plaintiffs failed to allege facts sufficient to support a § 1350 claim, Judge Edwards concurred in the dismissal. *Id.* at 798; *accord* *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541-43 (N.D. Cal. 1987) (Jensen, D.J.) (ruling that § 1350 provided a right of action to two Argentine citizens who brought a claim against an Argentine general seeking damages on behalf of themselves and their families for acts of murder, torture, and prolonged and arbitrary detention committed by military personnel acting under the defendant’s authority).

The *Forti* action was dismissed because the plaintiffs failed to establish “the requisite degree of international consensus [sic] which demonstrates a customary international norm” regarding the disappearance of the mother of one of the plaintiffs. *Id.* at 1542-43. The court also dismissed the plaintiffs’ claims of “cruel, inhuman or degrading treatment” on the grounds that they failed to provide sufficient evidence of international consensus regarding this norm. *Id.* at 1543. The court concluded that this claim “lacks readily ascertainable parameters.” *Id.* The court later dismissed the plaintiffs’ motion to reconsider dismissal of the claim for “Torture or other Cruel, Inhuman or Degrading Treatment,” but granted leave to amend the complaint to include the claim for “Disappearance and Presumed Summary Execution.” *Forti v. Suarez-Mason*, 694 F. Supp. 707, 712 (N.D. Cal. 1988).

For further discussion of the *Tel-Oren* decision, see Anthony D’Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork’s Concept of the Law of Nations Is Seriously Mistaken*, 79 AM. J. INT’L L. 92 (1985) (providing a detailed critique of Judge Bork’s position); Alfred P. Rubin, *What Does Tel-Oren Tell Lawyers? Professor D’Amato’s Concept of American Jurisdiction Is Seriously Mistaken*, 79 AM. J. INT’L L. 105 (1985) (responding to Professor D’Amato’s critique of Judge Bork); Anthony D’Amato, *What Does Tel-Oren Tell Lawyers? Professor Rubin’s Reply Does Not Live up to Its Title*, 79 AM. J. INT’L L. 112 (1985) (rebutting Professor Rubin’s response).

314. Burke, *supra* note 302, at 322-28 (discussing the use of international human rights law to expand the scope of protections against human rights abuses under national law in state and federal courts).

315. *Id.* at 295-314 (discussing direct enforcement of international human rights law).

316. *Id.* at 315-22 (discussing the customary law theory), 322-26 (discussing the interpretive theory).

317. See *infra* notes 336-49 and accompanying text (discussing the theory of *jus cogens*).

law in general, and of article 7 in particular, in the United States.³¹⁸

a. *The Doctrine of Self-Execution*

In addition to the constitutional constraints on the application of treaties as domestic law,³¹⁹ the Supreme Court has imposed a further restraint: the doctrine of self-execution.³²⁰ The Court first introduced the doctrine in the early nineteenth century, in *Foster v. Neilson*.³²¹ There, the Court held that a treaty is self-executing, or directly implementable, in the United States only if "it operates of itself without the aid of any legislative provision."³²²

318. See *infra* notes 319-35 and accompanying text (discussing the self-execution doctrine).

319. See *supra* notes 302-14 and accompanying text (discussing various theories whereby international law may be applicable in the United States).

320. See Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988) (describing and defining the doctrine of self-execution). Paust concludes that all treaties are presumptively self-executing, "except those . . . which, by their terms considered in context, require domestic implementing legislation or seek to declare war on behalf of the United States. All treaties are supreme federal law, but some treaties, by their terms, are not directly operative." *Id.* at 782; see also Lillich, *supra* note 302, at 372-74 (discussing the Supreme Court's decision in *Foster v. Neilson* and the concept of self-execution); Burke, *supra* note 302, at 301-04 (describing and defining the concept of self-execution).

International legal scholars often draw a distinction between "monist" and "dualist" states. See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (4th ed. 1990); JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* (3d ed. 1995). According to JACKSON ET AL., "the 'monist' state's legal system is considered to include international treaties to which [the state] is obligated. . . . On the other hand, . . . [i]n a dualist state, international treaties are part of a separate legal system from that of the domestic law." *Id.* at 126. The doctrine of self-execution in effect bridges the gap between monist and dualist states in that it establishes that dualist states must enact implementing legislation in order to give effect to international treaties within their borders. But see *Sei Fujii v. State*, 242 P.2d 617, 620-22 (Cal. 1952) (holding that articles 55 and 56 of the United Nations Charter are not self-executing); see also *infra* notes 328-35 and accompanying text (discussing the *Sei Fujii* decision). In light of *Foster* and *Sei Fujii*, the United States must be regarded as a dualist state. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (recognizing that the doctrine of self-execution applies under United States law); *Sei Fujii*, 242 P.2d at 619-22; see also NEWMAN & WEISSBRODT, *supra* note 3, at 579-88 (discussing the *Sei Fujii* decision and the self-execution doctrine).

321. 27 U.S. (2 Pet.) 253, 314 (1829) (recognizing that the doctrine of self-execution applies under United States law). This decision later was overruled in part due to a different interpretation of the treaty sought to be enforced. *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833). *Foster* concerned title to a disputed tract of land in Louisiana that the plaintiff purchased from the Spanish government. *Id.* at 254. Plaintiff claimed that his title should be recognized under United States law pursuant to a treaty that Spain and the United States signed in 1819. *Id.* at 277. The Supreme Court, in an opinion by Chief Justice Marshall, ruled that plaintiff could not base his claim on the treaty because Congress had not ratified the treaty. *Id.* at 314-15.

322. *Id.* at 314. Chief Justice Marshall analogized such a treaty to a contract that awaited congressional "execution." *Id.*

A treaty is in its nature a contract between two nations, not a legislative act. It

In determining whether a treaty may be deemed self-executing, the most common point of reference is the intent of the signatory parties.³²³ If such an intent is unclear, the Third Restatement of the Foreign Relations Law of the United States [Third Restatement] advises courts to consider any statements that the executive or legislative branches made concerning the treaty.³²⁴ International legal scholars, however, have argued that self-execution must be evaluated in a broader context than that of the intent of the United States.³²⁵ Indeed some have argued that United States courts are neglecting their constitutional duty under the Supremacy Clause if they do not seek to implement faithfully the terms of a ratified treaty.³²⁶

does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.

In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

Id. Such implementing legislation is sometimes referred to as an "act of transformation." See JACKSON ET AL., *supra* note 320, at 127.

323. See 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987) [hereinafter THIRD RESTATEMENT]. The *Third Restatement* stipulates that:

In the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations. Accordingly, the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action.

Id.

324. *Id.* The *Third Restatement* suggests that the following sources provide persuasive evidence of the United States' intent: "any statement by the President in concluding the agreement or in submitting it to the Senate for consent or to the Congress as a whole for approval, and of any expression by the Senate or by Congress in dealing with the agreement." *Id.*

325. See, e.g., Burke, *supra* note 302, at 302. These commentators argue that self-execution depends on obligations that the treaty creates. *Id.* If the agreement merely involves a promise to enact domestic legislation or a general declaration of intent, then it is not self-executing. *Id.* Stefan Riesenfeld argues that a treaty is self-executing if it "(a) involves the rights and duties of individuals; (b) does not cover a subject for which legislative action is required by the Constitution; and (c) does not leave discretion to the parties in the application of the particular provision." Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgment*, 65 AM. J. INT'L L. 548, 550 (1971); see also JACKSON ET AL., *supra* note 320, at 129 (examining how a court determines when an international agreement is self-executing).

326. U.S. CONST. art. VI, cl. 2 (stating that "all Treaties made . . . under the Authority of the United States shall be the supreme Law of the Land"); see *Von Dardel v. U.S.S.R.*, 623

The issue of whether human rights clauses of the United Nations are self-executing in the United States, once ratified, is an open question. The International Court of Justice has ruled that the human rights provisions of the United Nations Charter impose binding obligations on all United Nations member states.³²⁷ The Supreme Court of California, however, in *Sei Fujii v. California*,³²⁸ ruled that articles 55(c) and 56 of the United Nations Charter are not self-executing.³²⁹ In *Sei Fujii*, the plaintiff, a Japanese alien, brought suit to recover land that he purchased in 1948 that escheated to the state under a California statute.³³⁰ The plaintiff argued that articles 55 and 56 of the United Nations Charter, which stipulate that member nations will promote the observance of human rights without discriminating on the basis of race, superseded the California statute.³³¹ The Supreme Court of California ruled that an individual could not bring suit under the United Nations Charter absent domestic implementing legislation.³³²

F. Supp. 246, 256 (D.D.C. 1985), *vacated, dismissed*, 736 F. Supp. 1 (D.D.C. 1990) (quoting RICHARD LILICH, FRANK NEWMAN, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY* 76 (1979)).

327. *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, 1971 I.C.J. 16, 57.

328. 242 P.2d 617 (Cal. 1952).

329. *Id.* at 620; see Lilich, *supra* note 302, at 374-85 (discussing the applicability of the United Nations Charter under United States law and concluding that *Sei Fujii* should be overruled); Richard B. Lilich, *The Role of Domestic Courts in Promoting International Human Rights Norms*, in *INTERNATIONAL HUMAN RIGHTS LAW*, *supra* note 302, at 105 (examining New York state and federal cases in which parties attempted to invoke international law, and in particular, the United Nations Charter and the Universal Declaration, in domestic litigation). Lilich criticizes the failure of those courts to accommodate international law in the domestic legal context, and attributes a large measure of responsibility for this trend to the *Sei Fujii* decision. *Id.* at 105, 130-31. Lilich applauds those litigants who have invoked international law, stating that "[a]t the very least, they have raised the consciousness of lawyers, judges, government officials and, last but not least, the general public — both in the United States and abroad — to the existence and, perhaps more importantly, to the potential of this body of law." *Id.* at 130-31. For further discussion, see Virginia Leary, *When Does the Implementation of International Human Rights Constitute Interference Into the Essentially Domestic Affairs of a State?*, in *INTERNATIONAL HUMAN RIGHTS LAW*, *supra* note 302, at 15. Leary concludes that:

gross violations of human rights can no longer be considered a matter essentially within the domestic jurisdiction of the offending state under the U.N. Charter, although there are limitations on the permissible actions of the U.N. in response to such violations in the absence of the finding of a direct threat to international peace.

Id. at 21.

330. *Sei Fujii*, 242 P.2d at 619.

331. *Id.*

332. *Id.* at 619-20. It is important to draw a distinction between the questions of whether a treaty is self-executing and whether an individual may be entitled to invoke that treaty's provisions — more specifically, whether the individual has "standing." JACKSON

Professor (formerly California Supreme Court Judge) Frank Newman has argued that the California Supreme Court's comments in *Sei Fujii* regarding the self-execution issue were dicta.³³³ Newman reasoned that subsequently ratified United Nations treaties such as ICCPR contain a degree of specificity not found in the United Nations Charter, increasing the likelihood that those subsequent treaties are self-executing.³³⁴ Article 7 contains such specificity.³³⁵

b. The Jus Cogens Argument for Direct Enforcement of Article 7 in the United States

In general, states may derogate their obligations under a particular provision of a treaty by adding a limitation to ratification.³³⁶ Some provi-

ET AL., *supra* note 320, at 129. Some forms of treaties or international agreements may be self-executing or may enjoy the support of implementing domestic legislation, yet individuals may not have standing to invoke purportedly relevant provisions in litigation. *See Diggs v. Richardson*, 555 F.2d 848, 849-50 (D.C. Cir. 1976) (ruling that individuals could not rely on a United Nations resolution calling on members to have no dealings with South Africa as long as South Africa continued to occupy Namibia). In *Diggs*, the United States Court of Appeals for the District of Columbia stated that "the U.N. resolution underlying that obligation does not confer rights on the citizens of the United States that are enforceable in court in the absence of implementing legislation." *Id.* at 850. For further discussion of the *Diggs* case, see INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 302, at 125-30.

333. *See People v. Mirmirani*, 636 P.2d 1130, 1138 n.1 (Cal. 1981) (Newman J., concurring) (discussing the "dicta" in *Sei Fujii*).

334. *See NEWMAN & WEISSBRODT, supra* note 3, at 294 (citing Frank Newman, *Interpreting the Human Rights Clauses of the U.N. Charter*, 1972 REVUE DES DROITS DE L'HOMME 283). Newman and Weissbrodt argue that the International Bill of Human Rights provides the authoritative interpretation of the more vague language of articles 55 and 56 of the United Nations Charter. *Id.* at 582. The greater specificity that the International Bill of Human Rights offers therefore rebuts any suggestion that its provisions may be considered non-self-executing due to vagueness. *Id.* This position is known as the Newman-Berkeley thesis. *Id.* at 582 n.14. Newman and Weissbrodt have argued that the question of whether articles 55 and 56 should be deemed to be self-executing as to a particular right in the International Bill of Human Rights depends on the specificity of the language of the particular provision. *Id.* at 583. Of course, the "non-self-executing" declaration might be interpreted as an implicit acknowledgement that ICCPR is otherwise directly enforceable in the United States.

335. *Id.* Newman and Weissbrodt argue that article 7 "is both sufficiently precise and generally accepted" to be deemed self-executing. *Id.*

336. *See Vienna Convention, supra* note 305. The Vienna Convention recognizes that states may enter a reservation when ratifying a particular provision of a treaty. *Id.* art. 2(1)(d) (defining a reservation as a "unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State"). *Id.* Article 19 of the Vienna Convention stipulates that "[a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless . . . the reservation is incompatible with the object and purpose of the treaty." *Id.* art. 19. Article 20 provides a mechanism whereby a State party may challenge the legitimacy of a reservation made by another State party. *Id.* art.

sions, however, are considered so fundamental that no derogation can be contemplated.³³⁷ The doctrine of *jus cogens* recognizes the establishment of certain peremptory norms under international law.³³⁸ Article 53 of the Vienna Convention on the Law of Treaties [Vienna Convention] defines a peremptory norm as a norm from which, due to fundamental character, no derogation is permitted.³³⁹ This lack of derogability distinguishes a peremptory from a customary norm.³⁴⁰ The Third Restatement, in clari-

20. Articles 20 and 21 clearly state that reservations do not preclude the entry into force of a treaty. *Id.* arts. 20, 21; see *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15, 22-26 (delineating the conditions under which the International Court of Justice was prepared to permit State parties to make reservations to the Genocide Convention); 14 MARJORIE M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* § 17, at 137-38 (1970) (defining an "understanding" as a statement that clarifies or explains a treaty provision). Whiteman also defines "declaration" and "statement" as interchangeable terms used to denote an effort by a State party to give notice of an aspect of its law or policy). *Id.* at 138. See generally IAN M. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* (1973) (describing and analyzing the Vienna Convention).

337. See ICCPR, *supra* note 1, art. 4(2). Article 4(2) of ICCPR is the non-derogability clause, which stipulates that States parties may not derogate or deviate from certain of the most fundamental ICCPR provisions. *Id.*

338. Stanislaw E. Nahlik, Book Review, 84 AM. J. INT'L L. 779 (1990) (reviewing LAURI HANNIKAINEN, *PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS*). Nahlik quotes Hannikainen's description of peremptory norms:

[T]here are, in international law, rules of a peremptory character, referred to by scholars as *jus cogens* norms. To have that status, however, they must comply with four criteria . . . namely: they must be norms of *general* international law; they must be accepted by the international community of states as a *whole*; they must not be capable of derogation; and there must be no possibility of modifying them in any other way than by new peremptory norms.

Id. at 779 (citation omitted). Nahlik states that Hannikainen adds a fifth requirement: peremptory norms create an obligation toward the international community of states. *Id.* Nahlik describes Hannikainen's view of *jus cogens* as "a distinct supreme category within the whole body of international law rules." *Id.*; see also Meron, *supra* note 310, at 13-21 (discussing and defining the doctrine of *jus cogens*).

339. Vienna Convention, *supra* note 305, art. 53. A peremptory norm is defined by article 53 of the Vienna Convention as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id.* The United States has signed but not ratified the Vienna Convention. NEWMAN & WEISSBRODT, *supra* note 3, at 290 n.1.

340. Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 816 (1990) (distinguishing between customary and peremptory norms). Strossen defines customary norms as "those that are so widely accepted by the international community that they are binding even on states that have not ratified treaties embodying them." *Id.* at 816. Strossen then distinguishes peremptory norms as follows: "most international human rights principles are included in a subset of customary norms that are so fundamental that they are nonderogable. Referred to as 'peremptory' norms or '*jus cogens*,' these standards cannot be changed by agreement." *Id.* at 816-17. Strossen then cites the defini-

fying the Vienna Convention's definition, emphasizes that a norm does not lose its peremptory character in the face of the dissent of a few nations, so long as a substantial majority of nations recognize it.³⁴¹ The Third Restatement's definition of a peremptory norm includes "gross violations of human rights," which suggests that the definition includes torture.³⁴²

If torture, as incorporated into article 7 of ICCPR, does constitute a peremptory, non-derogable norm, the validity of the United States' "non-self-executing" declaration may be challenged on the ground that it violates the doctrine of *jus cogens*.³⁴³ Further, even if article 7 is not deemed to contain a peremptory norm, article 27 of the Vienna Convention provides a response to the United States' non-self-execution argument by stipulating that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."³⁴⁴ One means of reconciling the "non-self-executing" declaration with the peremptory character of the norm against torture is that the United States' qualification does not seek to derogate obligations of the United States respecting torture, but merely to limit the applicability of the other elements of article 7.³⁴⁵ However, that argument contains an inherent flaw: ICCPR itself contains a non-derogability clause, whereby a State party may not disregard or abstain from its non-derogable provisions.³⁴⁶ Article 4(2) of ICCPR designates article 7 as a non-derogable provision.³⁴⁷ Therefore, the "non-self-executing" declaration is not only contradictory to the essence of ICCPR, but also constitutes an attempt to disregard one of ICCPR's most fundamental provisions.³⁴⁸ As such, the "non-self-executing" declaration reads more as a repudiation of ICCPR's essence.³⁴⁹

tion of peremptory norms in the Vienna Convention for further clarification. *Id.* at 817 n.50 (citing Vienna Convention, *supra* note 305, art. 53).

341. THIRD RESTATEMENT, *supra* note 323, § 102, reporter's note 6.

342. *Id.* The Third Restatement specifically lists genocide, slave-trading, slavery, apartheid, and "perhaps attacks on diplomats" as violating *jus cogens*. *Id.*

343. See *supra* notes 336-40 and accompanying text (explaining that norms that are peremptory or *jus cogens* are non-derogable).

344. Vienna Convention, *supra* note 305, art. 27.

345. ICCPR, *supra* note 1, art. 7. These might include the article 7 wording concerning "cruel, inhuman or degrading" and the article 7 protection of treatment as well as punishment. See *id.*

346. ICCPR, *supra* note 1, art. 4(2). Article 4(2) of ICCPR states that "no derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision." *Id.*

347. *Id.*

348. ICCPR, *supra* note 1, art. 4(2); *contra* SENATE REPORT, *supra* note 9, at 652. The Senate Report makes no reference to the non-derogability provision contained in article 4(2) of ICCPR. *Id.*

349. One writer has argued that the reservations, qualifications, and declarations have

III. THE "NON-SELF-EXECUTING" DECLARATION

The Senate Committee on Foreign Relations' report on ratification of ICCPR [Senate Report] contained a number of general arguments in favor of the "non-self-executing" declaration. First, it sought to prevent the establishment of a new cause of action under ICCPR in federal and state courts.³⁵⁰ Second, it stated that ICCPR protections generally already are available under United States law.³⁵¹ Third, the Senate Report argued that certain ICCPR provisions may conflict with the United States Constitution.³⁵² For example, hate speech violates ICCPR, but the United States Supreme Court has recognized it as a protected right under the First Amendment of the United States Constitution.³⁵³

The Senate Report specifically addressed article 7's applicability to American jurisprudence.³⁵⁴ The Senate Report argued that, because the United States already was in the process of ratifying the "more detailed" Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [Torture Convention],³⁵⁵ an unreserved ratifi-

not eliminated the individual's recourse to ICCPR under United States law: Sandra B. Reiss, *The International Covenant on Civil and Political Rights: Can It Free the Cuban Detainees?*, 6 EMORY INT'L L. REV. 577, 631 (1992) (analyzing whether the United States' ratification of ICCPR might offer Cuban refugees detained by the United States a legal remedy). Reiss argues that the ratification of ICCPR offers "avenues of hope to those who are currently 'excluded' by our legal system." *Id.* at 631. Reiss, writing in the immediate aftermath of the ratification, concludes on an optimistic note:

Even though [ICCPR] was ratified as non-self-executing, it may 'assist in more liberal interpretation[s] of constitutional and legislative provisions, thus enlarging the sphere of the domestic protection of human rights.' It is especially important that the United States interpret its domestic legislation in keeping with its international obligations.

It would be sadly ironic if while the U.S. Constitution had an important affect [sic] in the formation of the Covenant, the Covenant would later play a narrow role in effecting rights in our own nation.

Id. at 634 (footnotes omitted).

350. See SENATE REPORT, *supra* note 9, at 657.

351. *Id.*

352. *Id.* at 649-50. The Committee Comments stated that "[t]he principal argument against ratification was rooted in concern about certain limitations that the Covenant allows on freedom of speech and freedom of expression." *Id.* at 650.

353. *Id.* The Committee Comments stated that ratification was conditional on ensuring that "no restrictions will be imposed on the rights of free speech and expression in the United States." *Id.*; see, e.g., *R.A.V. v. City of Saint Paul*, 505 U.S. 377, 391 (1992) (holding a city ordinance facially unconstitutional under the First Amendment for imposing special prohibitions against those expressing views on disfavored subjects).

354. SENATE REPORT, *supra* note 9, at 654.

355. Torture Convention, *supra* note 17. Article 1 of the Torture Convention provides a highly detailed definition of 'torture.' *Id.* art. 1. Article 16 of the Torture Convention, however, contains highly similar language to that of article 7 of ICCPR in stating that "[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other

cation of ICCPR would be both redundant and give rise to a lack of uniformity of interpretation between the Torture Convention and ICCPR.³⁵⁶ The Senate Report did not draw a direct parallel between the protections of the Eighth Amendment and those of article 7 of ICCPR.³⁵⁷ Instead, the Senate Report asserted that "[t]he rights guaranteed by the Covenant are similar to those guaranteed by the U. S. Constitution and the Bill of Rights."³⁵⁸ Specifically, the Senate Report equated article 7 protections with those available under the Fifth,³⁵⁹ Eighth,³⁶⁰ and Fourteenth³⁶¹ Amendments of the United States Constitution.³⁶² The Senate Report acknowledged, however, that article 7 offers greater protection than United States law on two issues: the death row phenomenon,³⁶³ and the

acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture." *Id.* art. 16.

356. SENATE REPORT, *supra* note 9, at 654. The Senate Report recommended the following reservation: "[t]he United States considers itself bound by Article 7 [of ICCPR] to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States." *Id.* The stated rationale for this reservation was the need to ensure uniformity of interpretation between ICCPR and the Torture Convention that the United States planned to ratify. *Id.*

357. *Id.* (limiting the scope of the United States' ratification of article 7 to the protections available under the Fifth, Eighth, and Fourteenth Amendments).

358. *Id.* at 649.

359. U.S. CONST. amend. V. The Fifth Amendment provides that:

[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id.

360. U.S. CONST. amend. VIII (stating that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

361. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides that:

[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

362. SENATE REPORT, *supra* note 9, at 654. This Comment does not address the extent to which article 7 protections may be found in the Fifth and Fourteenth Amendments.

363. *Id.* The Senate Report recognized that "the Human Rights Committee like the European Court of Human Rights [] has adopted the view that prolonged judicial proceedings in cases involving capital punishment could in certain circumstances constitute [cruel, inhuman or degrading treatment or punishment]." *Id.*

imposition of capital punishment on juveniles.³⁶⁴

A. *The Death Row Phenomenon*

Neither the Eighth Amendment³⁶⁵ nor ICCPR³⁶⁶ expressly prohibit the imposition of capital punishment. However, while the United States Supreme Court has interpreted the Eighth Amendment as imposing only procedural and methodological limits on the imposition of capital punishment,³⁶⁷ ICCPR is unambiguously hostile³⁶⁸ to what Justice Brennan once described as "truly an awesome punishment."³⁶⁹

364. *Id.* at 650. The Senate Committee Comments stated that "the Covenant prohibits the imposition of the death penalty for crimes committed by persons below the age of eighteen but U.S. law allows it for juveniles between the ages of 16 and 18." *Id.*

365. *See supra* note 13 (quoting the language of the Eighth Amendment).

366. ICCPR, *supra* note 1, art. 6(2).

367. *See supra* notes 110-68 and accompanying text (discussing Eighth Amendment death penalty jurisprudence).

368. ICCPR, *supra* note 1, art. 6. Article 6 specifically addresses the death penalty and, although it does not prohibit application of the death penalty, the article emphasizes that those "countries which have not abolished the death penalty" should reserve this sanction only for "the most serious crimes." *Id.* art. 6(2). Article 6(2) is stated in terms that suggest that abolition of the death penalty is, or at least should be, the norm:

[i]n countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

Id.

Article 6(6) confirms this interpretation, stating that "[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant." *Id.* art. 6(6).

If ICCPR's failure to incorporate an express prohibition of the death penalty suggested equivocation on this issue, the General Assembly's adoption of a Second Optional Protocol eliminated any such suggestion. Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128 (XLIV), U.N. GAOR, 44th Sess., Supp. No. 49, at 206, U.N. Doc. A/44/49 (1989), approved Dec. 15, 1989, reprinted in 29 I.L.M. 1464 (1990) [hereinafter OP2]. The title of OP2 incorporates the words, "*aiming at the abolition of the death penalty.*" *Id.* (emphasis added). A country that has ratified OP2 has agreed that no individual within its jurisdiction shall be executed, and agrees to undertake "all necessary measures to abolish the death penalty within its jurisdiction." *Id.* art. 1(2). By December 31, 1994, 25 States parties to ICCPR had ratified, and a further five had signed but not yet ratified, OP2. *Human Rights: International Instruments: Chart of Ratifications as at 31 December 1994* (ST/HR/4/Rev.11) (1995). The United States was not among these signatories. *Id.*

369. *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring). Justice Brennan noted earlier in his opinion that "[t]he only explanation for the uniqueness of death is its extreme severity. Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering." *Id.* at 287.

The Senate Report conceded that United States law does not offer the same protection against the death row phenomenon that article 7 provides.³⁷⁰ In its discussion of the death row phenomenon, the Senate Re-

370. SENATE REPORT, *supra* note 9, at 654. Richard Lillich has argued, however, that *Soering* might reflect customary international law as an interpretation of article 3 of the European Convention on Human Rights, which tracks the Universal Declaration. Lillich, *supra* note 243, at 146. One federal judge has described the limits of *Soering*'s applicability in the United States thus: "*Soering* constitutes an important precedent on the refusal to extradite because of anticipated torture, cruel conditions of incarceration or lack of due process at trial in the requesting country. It reflects a persuasive though non-binding international standard." *Ahmad v. Wigen*, 726 F. Supp. 389, 414 (E.D.N.Y. 1989), *aff'd*, 910 F.2d 1063 (2d Cir.), *stay denied*, 497 U.S. 1054 (1990).

Yet, ironically, the United States Supreme Court's decision in *Furman v. Georgia* has been most influential over the development of what might be termed the international "death row phenomenon" jurisprudence. See, e.g., Catholic Comm'n for Justice and Peace in Zimbabwe v. Attorney-General, Judgment No. S.C. 73/93 of 24 June 1993, *reprinted in* 14 HUM. RTS. L. J. 323, 326 (1993) (citing Justice Brennan's discussion in *Furman* of the "mental pain" that the death penalty inflicts); *Riley v. Attorney-General of Jamaica*, 1 A.C. 719, 734 (1983) (Lord Scarman and Lord Brightman, dissenting) (citing *Furman* in condemning the "inhumanity and degradation a delayed death penalty can cause").

Furman certainly opened the door to the view that the death row phenomenon violates the Eighth Amendment. See Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814 (1972) (arguing that the death row phenomenon constitutes cruel and unusual punishment).

Since the ratification of ICCPR, members of the Supreme Court have expressed views on the death row phenomenon that are more consistent with international opinion. See, e.g., *Lackey v. Texas*, 115 S. Ct. 1421 (1995) (Stevens, J., commenting on denial of certiorari). In *Lackey*, Justice Stevens, joined by Justice Breyer, questioned "whether executing a prisoner who ha[d] already spent some 17 years on death row violates the Eighth Amendment's prohibition against cruel and unusual punishment." *Id.* at 1421. Justice Stevens, in arguing that such a protracted stay on death row would have offended the English Bill of Rights of 1689 (the prototype for the United States' Eighth Amendment provision), quoted the *Riley* case, which stated that "'execution after inordinate delay would have infringed the prohibition against cruel and unusual punishments to be found in section 10 of the Bill of Rights of 1689.'" *Id.* at 1422 (quoting *Riley v. Attorney-General of Jamaica*, 1 A.C. 719, 734 (1983)); see also *State v. McKenzie*, 894 P.2d 289, 294 (Mont. 1995) (Leaphart, J., dissenting) (arguing for remand to consider whether 20 years on death row constitutes cruel and unusual punishment in light of Justice Stevens' comments in *Lackey*).

Just prior to his retirement from the Supreme Court, Justice Blackmun repudiated the death penalty in scathing terms:

[f]rom this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored — indeed, I have struggled — along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies . . . The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some

port made specific reference to the European Court is landmark ruling in *Soering v. United Kingdom*.³⁷¹ The European Court did not premise its decision in *Soering* on the threat of the death penalty *per se*, but on the prospect that the defendant would have to endure a long wait on death row.³⁷² The Senate Report acknowledged that, following *Soering*, the

defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.

Callins v. Collins, 114 S. Ct. 1127, 1130-31 (1994) (Blackmun, J., dissenting from denial of certiorari) (footnote omitted).

Perhaps international pressure has played some part in these indications of concern emanating from the Supreme Court. See, e.g., *British Lawyers Try to Halt U.S. Executions*, REUTERS, Feb. 21, 1995 (available in LEXIS, Nexis, Curnws file) (detailing the efforts of lawyers representing the Bar of England and Wales Human Rights Committee to petition the United States courts on behalf of the defendants in *Lackey*, arguing that holding the two prisoners for a combined duration exceeding 30 years on death row amounted to cruel, inhuman, and degrading treatment, in violation of both the Eighth Amendment and ICCPR).

However, American public opinion seems to have been moving in the opposite direction. See, e.g., Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES MAGAZINE, July 16, 1995, at 20 (profiling Philadelphia District Attorney Lynne Abraham, of whom Rosenberg states that "no one is more zealous in seeking the death penalty," and attributing Abraham's popularity to her enthusiasm for capital punishment). In March, 1995, following the Republican Party's landslide gains in the national elections of November, 1994, New York revived its death penalty statute. N.Y. PENAL LAW § 60.06 (McKinney 1995); see *Today's News Update*, N.Y. L.J., Mar. 8, 1995, at 1 (reporting that recently-elected Governor George Pataki, "using the pens of two slain police officers, signed a bill yesterday making New York the 38th state with a death penalty"). Bronx District Attorney Robert T. Johnson responded that his office would not seek the death penalty, but would opt to use prosecutorial discretion to seek life without parole. *Id.*

371. SENATE REPORT, *supra* note 9, at 654 (discussing *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989)).

372. Lillich, *supra* note 243, at 144. Lillich argues that "the Court apparently was reluctant to rule that the 'death row phenomenon' in itself amounted to inhuman or degrading treatment or punishment. Why it did not do so one can only speculate, for ample data to justify such a ruling have been available for several decades." *Id.*

The English House of Lords, however, has ruled that the death row phenomenon does not violate article 7 where the prisoner provides the impetus for the protracted wait on death row by filing successive appeals. *Riley*, 1 A.C. at 725. But see *Pratt and Morgan v. Attorney-General of Jamaica*, 2 A.C. 1 (1993) (examining the majority decision in *Riley*). In *Pratt and Morgan*, the Judicial Committee of the Privy Council ruled that a prolonged delay in carrying out a death sentence could constitute inhuman treatment, irrespective of whether the state or the individual's pursuit of appeals caused the delay. *Id.*; see also *Martin v. Jamaica*, Communication No. 317/1988, reprinted in 1 INT'L HUM. RTS. R. 128, 131 (1994) (ruling that a prolonged stay on death row due to protracted judicial proceedings does not *per se* constitute cruel, inhuman, or degrading treatment under article 7, even if it becomes a source of psychological strain for the condemned individual).

The *Riley* critique, that it is inconsistent to argue that a protracted wait on death row violates the international standard when successive appeals have precipitated the wait, has been criticized by both judges and writers. See *Lenhard et al. v. Wolff*, 444 U.S. 807, 812 (1979) (Marshall, J., dissenting from the Court's decision to deny a stay of execution); Melvin I. Urofsky, *A Right to Die: Termination of Appeal for Condemned Prisoners*, 75 J.

death row phenomenon³⁷³ may give rise to violations of ICCPR.³⁷⁴ This, the Senate Report argued, obliged the United States to enter a "reservation limiting our undertakings in this respect to the prohibitions of the Fifth, Eighth and/or Fourteenth Amendments."³⁷⁵

B. The Application of Capital Punishment to Juveniles

The Senate Report also incorporated a reservation to the ratification of ICCPR with respect to the execution of juveniles.³⁷⁶ This reservation sought to clarify that "the United States does not accept the [ICCPR] prohibition on executing people for crimes committed while they were 16 or 17 years of age."³⁷⁷ Specifically, the reservation limits the applicability of article 6 of ICCPR in the United States.³⁷⁸ Article 6(5) states in pertinent part that a "[s]entence of death shall not be imposed for crimes com-

CRIM. L. & CRIMINOLOGY 553, 554 (1984) (describing the view that there is no right to terminate appeals since this is tantamount to "state-abetted suicide"). Urofsky disagrees with this view and argues that, under a capital punishment system, condemned prisoners should be free to elect to terminate their appeals and expedite their execution. *Id.*

373. SENATE REPORT, *supra* note 9, at 654. The European Court characterized the "death row phenomenon" as the highly damaging physical and emotional impact imposed on convicts who experience a lengthy wait in prison between the imposition of a death sentence and its execution. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 41 (1989). Features of the phenomenon include the length of detention prior to execution, prison conditions on death row, and the individual prisoner's age and mental state. *Id.* at 42-43.

374. SENATE REPORT, *supra* note 9, at 654.

375. *Id.* One commentator has described a protracted wait on death row to be a form of "death with torture." Robert Johnson, *Death Row Is No Life, It's Legalized Torture*, L.A. TIMES, Aug. 20, 1982, § 2, at 11; see also *Under Sentence of Death*, *supra* note 242, at 141; Barbara A. Ward, *Competency For Execution: Problems In Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 38-40 (1986) (discussing the psychological impact on the condemned prisoner of a protracted sojourn on death row and documenting the phenomenon of such prisoners becoming insane under death row conditions).

The UNHRC has reconciled continued application by States parties of the death penalty with the constraints of articles 6 and 7 by stipulating that a death sentence "must be carried out in such a way as to cause the least possible physical and mental suffering." *Ng v. Canada*, Communication No. 469/1991, *reprinted in* 15 HUM. RTS. L.J. 149, 157 (1994) (discussed *supra* notes 284-88).

376. SENATE REPORT, *supra* note 9, at 651.

377. *Id.*; see Edward F. Sherman, Jr., Note, *The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation*, 29 TEX. INT'L L.J. 69, 70-71 (1994) (describing and criticizing the United States' reservation).

378. SENATE REPORT, *supra* note 9, at 651. Although the United States' reservation addresses article 6 of ICCPR, it also reflects an inconsistency between article 7 of ICCPR and comparable United States law. Article 6 specifically addresses the death penalty and discusses the circumstances under which capital punishment is inappropriate. *Id.* As such, article 6 is really a subset of the broader protections guaranteed by article 7. By definition, a violation of article 6 inevitably incorporates an article 7 violation. Compare ICCPR, *supra* note 1, art. 6 (stipulating restrictions on the applicability of the death penalty) with

mitted by persons below eighteen years of age.”³⁷⁹ The reservation was necessary in light of the Supreme Court’s decision in *Stanford v. Kentucky*,³⁸⁰ in which the Court held that the imposition of capital punishment on an individual for a crime committed at the age of sixteen or seventeen years does not necessarily constitute cruel and unusual punishment in violation of the Eighth Amendment.³⁸¹

The reservation flies in the face of the non-derogability provision contained in article 5(2) of ICCPR, which unambiguously renders ICCPR’s article 6 prohibition against juvenile executions non-derogable.³⁸² In addition, the reservation begs the question whether article 6(5) of ICCPR constitutes a peremptory, non-derogable norm of international law.³⁸³ The United Nations Special Rapporteur on Summary or Arbitrary Executions has expressed the view that article 6(5) may constitute a non-derogable norm.³⁸⁴ If article 6(5) does constitute a non-derogable norm,

ICCPR, *supra* note 1, art. 7 (prohibiting the infliction of cruel, inhuman or degrading treatment or punishment).

379. ICCPR, *supra* note 1, art. 6(5).

380. 492 U.S. 361 (1989).

381. *Id.*; see *supra* notes 152-68 and accompanying text (discussing the *Stanford* decision).

382. ICCPR, *supra* note 1, art. 5. Article 5 states that:

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.
2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Id.; see also Sherman, *supra* note 377, at 70-72. Sherman provides a detailed critique of the reservation. *Id.* He assails the reservation for its inherent incompatibility with the non-derogable provisions of ICCPR, and for its conceivable incompatibility with the object and purpose of ICCPR. *Id.* at 70-71. Furthermore, Sherman argues that the reservation may violate customary international law, and may be void *per se* if it violates a peremptory norm of international law. *Id.* at 71. Sherman adds that the reservation constitutes “[t]he United States’ defiance of international legal obligations.” *Id.*

383. See generally *supra* notes 336-49 and accompanying text (discussing the concepts of *jus cogens* and peremptory norms); see also *supra* notes 346-49 and accompanying text (discussing the incompatibility of the United States’ reservations with the non-derogability provision contained in article 4(2) of ICCPR).

384. See *supra* note 259 and accompanying text (explaining the role of the Special Rapporteur). Describing the article 6 prohibition on juvenile executions as “a United Nations standard of global validity,” the Special Rapporteur has stated that:

[t]he International Covenant on Civil and Political Rights proscribes the application of the death penalty to anyone below the age of 18 at the time when the offence was committed. While some reservations have been formally entered to this provision, the Covenant nevertheless has a special status, having been proclaimed and adopted by the General Assembly and having received for the most

then the United States' reservation on juvenile executions is an invalid and redundant attempt to derogate from a fundamental tenet of international law.³⁸⁵ Irrespective of the issue of the non-derogability provision of article 6(5), the need for the juvenile execution reservation underlined the irreconcilable gap between United States and international law on this issue. Specifically, the United States' position, as propounded by the Supreme Court in *Stanford*, is diametrically opposed to the international consensus approach embodied in articles 6 and 7 of ICCPR.

IV. CONCLUSION

The United States' rationale for the "non-self-executing" declaration was partially premised on the notion of comparability between article 7 and the Eighth Amendment.³⁸⁶ The language of the two provisions is not actually congruent: Article 7 is more detailed and specific than that of the Eighth Amendment. Yet, the very ambiguity of the Eighth Amendment's language arguably leaves room to accommodate an interpretation consonant with article 7.

Until the early 1980s, the Supreme Court pursued a course of steadily expanding its interpretation of the Eighth Amendment. Indeed, with the *Furman* decision, which represented the high-water mark of this expansion, the Court broadened its definition of Eighth Amendment protection to a point of symmetry with international law — at least with respect to the death penalty.³⁸⁷ International standards and norms clearly influ-

part widespread acknowledgement throughout the international community. In some recent instances the attention of the Special Rapporteur has been drawn to persons executed or about to be executed, having been duly convicted and sentenced in accordance with the law although it has been established beyond doubt that they were under 18 years of age when the crimes in question were committed.

Weissbrodt, *supra* note 259, at 689-90 (quoting the fourth report of the Special Rapporteur, U.N. Doc. E/CN.4/1986/21, at 100).

Weissbrodt concludes that "[t]his provision [article 6(5)] may not be the subject of derogation under any circumstances." *Id.* at 690 (citing similar provisions in the American Convention on Human Rights and the Geneva Convention on the Protection of Civilians in Time of War as further support for the non-derogability of article 6(5)).

385. See *supra* note 336-49 (discussing the concept of non-derogable or peremptory norms of international law and explaining why no state may deviate or seek exemption from compliance with such a norm).

386. Of course, if the United States could show that the protections of the Fifth and Fourteenth Amendments compensate for any deficiencies of protection in the Eighth Amendment relative to article 7, then the United States' rationale would be sustainable.

387. See *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (striking down certain state death penalty statutes as violating the Cruel and Unusual Punishments Clause of the Eighth Amendment); cf. ICCPR, *supra* note 1, art. 6 (disapproving and limiting the application of, but not prohibiting, the death penalty); *Soering v. United Kingdom*, 161 Eur. Ct.

enced this expansion.

Since the early 1980s, however, the Supreme Court has retreated from this progressive course. The result has been a narrowing of Eighth Amendment protection relative to that of the international standard. This narrowing has been sufficiently significant to suggest that little or no symmetry now exists between the Eighth Amendment and the international standard as embodied by article 7.

Decisions of both the European Court and the UNHRC indicate significant areas of protection under the international standard that are not available under the Eighth Amendment. Indeed, it is difficult to reconcile even the most narrow interpretation of the international standard with the Supreme Court's prevailing interpretation of the Eighth Amendment. The divergent treatment of the issues of the death row phenomenon and the application of capital punishment to juveniles under article 7 and the Eighth Amendment clearly illustrates this schism.

The legitimacy of the Supreme Court's retreat from the path of progressive Eighth Amendment interpretation may be questioned in the context of domestic constitutional jurisprudence. By distancing itself from the protections of article 7, however, the Supreme Court has undermined the United States' rationale for the "non-self-executing" declaration. The premise of the "non-self-executing" declaration was the assertion that United States law meets the requirements of ICCPR, and that therefore implementing legislation is not necessary. But if the Eighth Amendment fails to incorporate the relevant provisions of ICCPR, then the United States is left with two options. It either may pass implementing legislation enabling article 7 to become part of United States law, or it can repudiate article 7 entirely. The present hedge of stillborn ratification is not viable.

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H.R. (ser. A) at 40 (1989) (recognizing that the European Convention, following ICCPR, does not provide a total ban on the infliction of capital punishment).